MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 21, 2009, through August 13, 2009

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MARILYN KELLY	2013
Justices	
MICHAEL F. CAVANAGH	2015
ELIZABETH A. WEAVER	2011
MAURA D. CORRIGAN	2015
ROBERT P. YOUNG, Jr.	2011
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

JOHN K. PARKER	DANIEL C. BRUBAKER
TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
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NELSON S. LEAVITT	FREDERICK M. BAKER, Jr.
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEN M. DAWSON
ANNE-MARIE HYNOUS VOICE	RUTH E. ZIMMERMAN
DON W. ATKINS	SAMUEL R. SMITH
JÜRGEN O. SKOPPEK	ANNE E. ALBERS

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO
Reporter of Decisions: DANILO ANSELMO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
HENRY WILLIAM SAAD	2015
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2015
Judges	
DAVID H. SAWYER	2011
WILLIAM B. MURPHY	2013
MARK J. CAVANAGH	2009
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
RICHARD A. BANDSTRA	2015
JOEL P. HOEKSTRA	2011
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2011
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2011
BRIAN K. ZAHRA	2013
PATRICK M. METER	2015
DONALD S. OWENS	2011
KIRSTEN FRANK KELLY	2013
PAT M. DONOFRIO	2011
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
ALTON T. DAVIS	2015
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2011
DOUGLAS B. SHAPIRO	2013

Chief Clerk: SANDRA SCHULTZ MENGEL
Research Director: LARRY S. ROYSTER

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2011
	CHARLES T. LaSATA	2011
3.	DEBORAH ROSS ADAMS	2013
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2013
	ANNETTE J. BERRY	2013
	GREGORY D. BILL	2013
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2011
	MEGAN MAHER BRENNAN	2015
	BILL CALLAHAN	2015
	JAMES A. CALLAHAN	2011
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2013
	JAMES R. CHYLINSKI	2011
	ROBERT J. COLOMBO, Jr.	2013
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	GERSHWIN ALLEN DRAIN	2011
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2013
	PATRICIA SUSAN FRESARD	2011
	SHEILA ANN GIBSON	2011
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2011
	RICHARD B. HALLORAN, Jr.	2013
	AMY PATRICIA HATHAWAY	2013
	CYNTHIA GRAY HATHAWAY	2011

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2011
	MURIEL D. HUGHES	2011
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	MARY BETH KELLY	2015
	TIMOTHY MICHAEL KENNY	2011
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2011
	KATHLEEN M. McCARTHY	2013
	WADE H. McCREE	2015
	BRUCE U. MORROW	2011
	JOHN A. MURPHY	2011
	MARIA L. OXHOLM	2013
	LINDA V. PARKER	2013
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2011
	DANIEL P. RYAN	2013
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2011
	LESLIE KIM SMITH	2013
	VIRGIL C. SMITH	2013
	JEANNE STEMPIEN	2011
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2011
	DEBORAH A. THOMAS	2013
	ISIDORE B. TORRES	2011
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2011
	JOHN G. McBAIN, Jr.	2015
	CHAD C. SCHMUCKER	2011
	THOMAS D. WILSON	2013
5.	JAMES H. FISHER	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2013
	RAE LEE CHABOT	2011
	MARK A. GOLDSMITH	2013
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015
	DENISE LANGFORD MORRIS	2013

		Term Expires January 1 of
	CHERYL A. MATTHEWS	2011
	JOHN JAMES McDONALD	2011
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2011
	DANIEL PATRICK O'BRIEN	2011
	WENDY LYNN POTTS	2013
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2013
	JOAN E. YOUNG	2011
7.	DUNCAN M. BEAGLE	2011
	JOSEPH J. FARAH	2011
	JUDITH A. FULLERTON	2013
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2013
	GEOFFREY L. NEITHERCUT	2013
	DAVID J. NEWBLATT	2011
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2011
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2011
	J. RICHARDSON JOHNSON	2011
	PAMELA L. LIGHTVOET	2013
	ALEXANDER C. LIPSEY	2011
10.	JANET M. BOES	2013
	FRED L. BORCHARD	2011
	WILLIAM A. CRANE	2011
	DARNELL JACKSON	2013
	ROBERT L. KACZMAREK	2009
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2011
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2011
	WILLIAM C. MARIETTI	2011
	JOHN C. RUCK	2015
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2011
	RICHARD L. CARETTI	2011
	MARY A. CHRZANOWSKI	2011
	DIANE M. DRUZINSKI	2015
	JOHN C. FOSTER	2015

		Term Expires January 1 of
	PETER J. MACERONI	2015
	DONALD G. MILLER	2013
	EDWARD A. SERVITTO, Jr.	2013
	MARK S. SWITALSKI	2013
	MATTHEW S. SWITALSKI	2015
	ANTONIO P. VIVIANO	2011
	DAVID VIVIANO	2013
	TRACEY A. YOKICH	2013
17.	GEORGE S. BUTH	2011
	PAUL J. DENEFELD	2011[1]
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2013
	DENNIS B. LEIBER	2013
	JAMES ROBERT REDFORD	2011
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2013
	CHRISTOPHER P. YATES	2013
	DANIEL V. ZEMAITIS	2015
18.	WILLIAM J. CAPRATHE	2011
	KENNETH W. SCHMIDT	2013
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	CALVIN L. BOSMAN	2011
	JON H. HULSING	2015
	EDWARD R. POST	2011
	JON VAN ALLSBURG	2013
21.	PAUL H. CHAMBERLAIN	2011
	MARK H. DUTHIE	2013
22.	ARCHIE CAMERON BROWN	2011
	TIMOTHY P. CONNORS	2013
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2009
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2011
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2013
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015

[1] From August 10, 2009.

		Term Expires January 1 of
29.	MICHELLE M. RICK	2011
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2013
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2011
	JAMES R. GIDDINGS	2011
	JANELLE A. LAWLESS	2015
	PAULA J.M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	PETER E. DEEGAN	2011
	DANIEL J. KELLY	2015
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2011
35.	GERALD D. LOSTRACCO	2015
36.	WILLIAM C. BUHL	2013
	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2011
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2011
	CONRAD J. SINDT	2013
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL W. LABEAU	2013
	MICHAEL A. WEIPERT	2011
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2013
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2011
41.	MARY BROUILLETTE BARGLIND	2011
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2011
44.	MICHAEL P. HATTY	2013
	STANLEY J. LATREILLE	2013
	DAVID READER	2011
45.	PAUL E. STUTESMAN	2013
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015
47.	STEPHEN T. DAVIS	2011
48.	GEORGE R. CORSIGLIA	2011
	KEVIN W. CRONIN	2015

		Term Expires January 1 of
49.	SCOTT P. HILL-KENNEDY	2013
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2011
54.	PATRICK REED JOSLYN	2013
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2013
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2013

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2013
	JACK VITALE	2011
2A.	NATALIA M. KOSELKA	2011
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENFROW	2015
5.	GARY J. BRUCE	2011
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2013
	DENNIS M. WILEY	2011
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2011
8-1.	ANNE E. BLATCHFORD	2011
	PAUL J. BRIDENSTINE	2013
	CAROL A. HUSUM	2011
8-2.	ROBERT C. KROPF	2015
8-3.	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2011
10.	SAMUEL I. DURHAM, Jr.	2011
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2013
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2011
	JAMES M. JUSTIN	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2013
	KIRK W. TABBEY	2011
14B.	CHARLES POPE	2015
15.	JULIE CREAL	2013
	CHRISTOPHER S. EASTHOPE	2015

		Term Expires January 1 of
	ELIZABETH POLLARD HINES	2011
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2013
17.	KAREN KHALIL	2011
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2013
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2011
	MARK W. SOMERS	2015
	RICHARD WYGONIK	2013
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2013
21.	RICHARD L. HAMMER, Jr.	2015
22.	SYLVIA A. JAMES	2013
23.	GENO SALOMONE	2013
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2011
25.	DAVID A. BAJOREK	2015
	DAVID J. ZELENAK	2011
26-1.	RAYMOND A. CHARRON	2015
26-2.	MICHAEL F. CIUNGAN	2015
27.	RANDY L. KALMBACH	2013
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2013
30.	BRIGETTE R. OFFICER	2011
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2013
	EDWARD J. NYKIEL	2011
34.	TINA BROOKS GREEN	2013
	BRIAN A. OAKLEY	2011
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2011
	RONALD W. LOWE	2013
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2011
	ROBERTA C. ARCHER	2013
	MARYLIN E. ATKINS	2013
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2011
	ESTHER LYNISE BRYANT-WEEKES	2008
	RUTH C. CARTER	2011
	DONALD COLEMAN	2013
	NANCY A. FARMER	2013
	DEBORAH GERALDINE FORD	2011

		Term Expires January 1 of
	RUTH ANN GARRETT	2013
	RONALD GILES	2015
	KATHERINE HANSEN	2011
	BEVERLY J. HAYES-SIPES	2015
	PAULA G. HUMPHRIES	2011
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2013
	WILLIE G. LIPSCOMB, Jr.	2015
	LEONIA J. LLOYD	2011
	MIRIAM B. MARTIN-CLARK	2011
	DONNA R. MILHOUSE	2013
	B. PENNIE MILLENDER	2011
	CYLENTHIA L. MILLER	2011
	MARK A. RANDON	2015
	KEVIN F. ROBBINS	2013
	DAVID S. ROBINSON, Jr.	2013
	C. LORENE ROYSTER	2013
	BRENDA KAREN SANDERS	2015
37.	JOHN M. CHMURA	2013
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2011
	WALTER A. JAKUBOWSKI, Jr.	2013
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2013
	CATHERINE B. STEENLAND	2011
40.	MARK A. FRATARCANGELI	2013
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2013
	STEPHEN S. SIERAWSKI	2011
	KIMBERLEY ANNE WIEGAND	2013
41B.	LINDA DAVIS	2015
	SEBASTIAN LUCIDO	2013
	SHEILA A. MILLER	2011
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2011[1]
43.	KEITH P. HUNT	2013
	JOSEPH LONGO	2011
	ROBERT J. TURNER	2009
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013

[1] From August 10, 2009.

		Term Expires January 1 of
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2011
47.	JAMES BRADY	2015
	MARLA E. PARKER	2011
48.	MARC BARRON	2011
	DIANE D'AGOSTINI	2013
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2013
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2011
	CYNTHIA THOMAS WALKER	2015
51.	RICHARD D. KUHN, JR.	2015
	PHYLLIS C. MCMILLEN	2013
52-1.	ROBERT BONDY	2013
	BRIAN W. MACKENZIE	2015
	DENNIS N. POWERS	2011
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2011
52-3.	LISA L. ASADOORIAN	2013
	NANCY TOLWIN CARNIAK	2011
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	MICHAEL A. MARTONE	2011
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2011
	CAROL SUE READER	2013
54A.	LOUISE ALDERSON	2011
	PATRICK F. CHERRY	2015
	FRANK J. DELUCA	2013
	CHARLES F. FILICE	2015
	AMY R. KRAUSE	2011
54B.	RICHARD D. BALL	2011
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2015
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2011
	JULIE H. REINCKE	2015
56B.	GARY R. HOLMAN	2013
57.	WILLIAM A. BAILLARGEON	2013
	STEPHEN E. SHERIDAN	2013
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015

		Term Expires January 1 of
	KENNETH D. POST	2011
59.	PETER P. VERSLUIS	2011
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2013
	ANDREW WIERENGO	2011
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2011
	JEANINE NEMESI LAVILLE	2013
	BEN H. LOGAN, II	2013
	DONALD H. PASSENGER	2011
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2013
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. MCDONALD	2015
66.	WARD L. CLARKSON	2013
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	RICHARD L. HUGHES	2011
67-3.	LARRY STECCO	2015
67-4.	MARK C. MCCABE	2015
	CHRISTOPHER ODETTE	2013
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2013
	MARY CATHERINE DOWD	2011
	HERMAN MARABLE, JR.	2013
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2013
	M. RANDALL JURRENS	2011
	M. T. THOMPSON, JR.	2015
70-2.	CHRISTOPHER S. BOYD	2011
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2013
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	RICHARD A. COOLEY, JR.	2011
	JOHN D. MONAGHAN	2013
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015
74.	CRAIG D. ALSTON	2015

		Term Expires January 1 of
	TIMOTHY J. KELLY	2013
	SCOTT J. NEWCOMBE	2011
75.	STEVEN CARRAS	2011
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015
85.	BRENT V. DANIELSON	2015
86.	JOHN D. FORESMAN	2011
	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2011
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2012
CARL F. JARBOE	2010
MATTHEW R. RUMORA	2010

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2013
Alger/Schoolcraft	CHARLES C. NEBEL	2013
Allegan	MICHAEL L. BUCK	2013
Alpena	THOMAS J. LaCROSS	2013
Antrim	NORMAN R. HAYES	2013
Arenac	JACK WILLIAM SCULLY	2013
Baraga	TIMOTHY S. BRENNAN	2013
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2013
Branch	FREDERICK L. WOOD	2013
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2013
Cass	SUSAN L. DOBRICH	2013
Cheboygan	ROBERT JOHN BUTTS	2013
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2013
Clinton	LISA SULLIVAN	2013
Crawford	MONTE BURMEISTER	2013
Delta	ROBERT E. GOEBEL, Jr.	2013
Dickinson	THOMAS D. SLAGLE	2013
Eaton	MICHAEL F. SKINNER	2013
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2013
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2013
Gogebic	JOEL L. MASSIE	2013
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	FRASER T. STROME	2013
Huron	DAVID L. CLABUESCH	2013

Ingham	R. GEORGE ECONOMY	2013
Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT SYKES, JR.	2013
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2013
Isabella	WILLIAM T. ERVIN	2013
Jackson	DIANE M. RAPPLEYE	2013
Kalamazoo	CURTIS J. BELL, JR.	2013
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2013
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2013
Kent	G. PATRICK HILLARY	2013
Kent	DAVID M. MURKOWSKI	2015
Keweenaw	JAMES G. JAASKELAINEN	2013
Lake	MARK S. WICKENS	2013
Lapeer	JUSTUS C. SCOTT	2013
Leelanau	JOSEPH E. DEEGAN	2013[1]
Lenawee	GREGG P. IDDINGS	2013
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2013
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2013
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	LaVAIL E. HULL	2013
Menominee	WILLIAM A. HUPY	2013
Midland	DORENE S. ALLEN	2013
Missaukee	CHARLES R. PARSONS	2013
Monroe	JOHN A. HOHMAN, JR.	2013
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Oakland	LINDA S. HALLMARK	2013
Oakland	EUGENE ARTHUR MOORE	2011
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Ogemaw	SHANA A. LAMBOURN	2013
Ontonagon	JOSEPH D. ZELEZNIK	2013
Oscoda	KATHRYN JOAN ROOT	2013
Otsego	MICHAEL K. COOPER	2013
Ottawa	MARK A. FEYEN	2013
Presque Isle	DONALD J. McLENNAN	2013
Roscommon	DOUGLAS C. DOSSON	2013
Saginaw	FAYE M. HARRISON	2015
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St. Joseph	THOMAS E. SHUMAKER	2013
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Wayne	DAVID J. SZYMANSKI	2015
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E-FILING PILOT PROJECT IN THE 56TH CIRCUIT COURT (EATON COUNTY)

Entered July 21, 2009 (File No. 2002-37)—REPORTER.

On order of the Court, the 56th Circuit Court is authorized to implement an Electronic Document Filing Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin as soon as possible after approval by the Court, and shall remain in effect until July 1, 2011, or further order of this Court. The 56th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 56th Circuit Electronic Document Filing Pilot Project, the 56th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 56th Circuit Court will track the participation and effectiveness of this pilot program and shall report to, and make such findings available to, the Michigan Supreme Court.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in

connection with the just, speedy, and economical determination of the actions involved in the pilot program. The 56th Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Court Rules govern all other aspects of the cases involved in the pilot program.

2. Definitions

a. "Clerk" means the Eaton County Clerk.

b. "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot program.

c. "LAO" means all local administrative orders governing the 56th Judicial Circuit Court.

d. "MCR" means Michigan Court Rules.

e. "Pilot program" means the initiative by the 56th Judicial Circuit Court, the Eaton County Clerk, the Eaton County Department of Information Services, and the Judicial Information Systems division of the State Court Administrative Office in conjunction with Wiznet, Inc. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. The Eaton County pilot program will begin testing with "C," "N," and circuit court domestic cases wherein the case suffix begins with a "D." The court intends this pilot program to include all circuit and family division judges, including the probate judge sitting by assignment in the family division of the circuit court. A judge may exempt a case or cases from the pilot program. The pilot program is expected to last approximately two years.

f. "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

g. "Filing Party" means any party or attorney representing a party who has registered to file pleadings or papers electronically in a particular matter.

3. Participation in the Pilot Program

a. Participation by parties and counsel in the pilot program will initially be voluntary to accommodate training. Commencing on a date certain to be set by the court approximately 90 days following the launch of the pilot program, all attorneys filing a new "DO" case shall be required to file all pleadings and papers therein electronically. On a date certain to be set by the court approximately 180 days following the initiation of mandatory "DO" filings, attorneys filing a new "DM" case shall be required to file all pleadings and papers therein electronically. Approximately 180 days following the initiation of mandatory "DM" filings, all attorneys filing a new civil case in circuit court wherein the suffix of the case starts with a "C" or an "N," and in all newly filed domestic matters not already required to be filed electronically wherein the suffix starts with a "D," all pleadings and papers filed therein shall be required to file electronically. Mandatory filings in an identified case type shall also include newly filed domestic post-disposition proceedings.

b. Parties not represented by counsel may voluntarily participate in the pilot program. An unrepresented party who initially chooses to voluntarily participate in this pilot program may withdraw from the program at any time by filing a hard copy of a paper or pleading pursuant to the Michigan Court Rules, at which time

the Clerk shall create a paper file and maintain the paper file as outlined in § 4(d).

c. Pursuant to the schedule outlined in § 3(a), it is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that would prevent an attorney or participating party from filing a document or documents electronically. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file a hard copy of their documents with the clerk, at which time the Clerk shall create a paper file and maintain the paper file as outlined in § 4(d).

d. A public access terminal will be available at the Eaton County Courthouse for those persons wishing to participate in the pilot program or to review electronically filed documents but without sufficient equipment to facilitate participation. The electronic filing system utilized for this pilot program limits access to those person who are parties in a matter to case files in which they have registered as a filing party. Those not a party to the case may access the case file by making a request to the Circuit Court Clerk, where proper protocol with regard to access to public and non-public files will be followed. Electronically retained documents may be printed and presented to the requester. A customary copy fee may be applied if the requestor seeks to retain the provided copy.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

a. In an effort to facilitate uniform service within the scope of this program, the 56th Circuit Court strongly recommends electronic service.

b. Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The clerk may, in accordance with MCR

8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, do not conform to the technical requirements of this pilot program, or are otherwise submitted in violation of a statute, MCR, LAO, or program rules.

c. E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Eaton County Clerk's Office during normal business hours of 8:00 a.m. to 5:00 p.m. E-filings received by the clerk's office before midnight will be granted that day's date for filing purposes. For purposes of determining e-filing receipt time, the receipt time reflected on the clerk's computer will serve as the official time of receipt.

d. In any mandatory case, as outlined in § 3(a), wherein all parties are represented by counsel, and subject to § 3(c), the court shall create and maintain only an electronic file. In those instances where a party is originally represented by counsel who subsequently withdraws and the party desires to continue in pro per without participating in this pilot program, a paper file shall be created by the clerk with a notice that the file was originally created electronically, and any documents filed before the creation of the paper file will be maintained electronically. Subsequent electronically filed documents will be retained in electronic format and only the verification of receipt of an electronically filed document will be placed into the paper file. If the pro per litigant wishes to participate in the pilot program, the clerk shall maintain only an electronic file.

e. In any mandatory case as outlined in § 3(a) wherein some parties are represented by counsel and other parties are not, and at least one of those parties not represented by counsel does not desire to voluntar-

ily participate in this pilot program, the clerk shall create a paper file. All pleadings and papers submitted electronically will be retained in electronic format and only the verification of receipt of an electronically filed document will be placed into the paper file. All paper filing will be retained in the paper file created by the clerk.

f. These rules apply to parties added or joined to an existing matter. If counsel represents the new party or parties, all papers filed by counsel must be done so in conformity with these rules. Sections 3(b), 4(d), and 4(e) set forth the respective rights and obligations of unrepresented parties. The clerk shall maintain its files in conformity with these rules.

g. E-filings shall be treated as if they were hand-delivered to the court for all purposes under statute, MCR, and LAO.

h. A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party or declarant:

i. Signatures submitted electronically shall use the following form: /s/ John L. Smith.

ii. A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

iii. An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

i. The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization or bill of costs)

must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory or opposing party.

j. Proposed orders shall be processed by the court in accordance with the provisions of the pilot program. The clerk shall present the document to the court for review and signature pursuant to MCR 2.602(B).

k. By electronically filing the document, the electronic filer indicates compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents and Motions; Judge's Copies; Hearings on Motions; Fees

a. All times for filing and serving e-filings shall be governed by applicable statute, MCR, and LAO, with the exception that e-filings received by the Clerk's Office before midnight will be granted that day's date for filing purposes, and electronic service sent before midnight will be deemed served on that business day.

b. The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request of the court, the filing party shall promptly provide an electronic or paper judge's copy to chambers.

c. For documents filed electronically, applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the Eaton County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

i. Each e-filing is subject to the following e-filing fees.

Type of Filing	Fee
EFO (e-filing only)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

ii. Users who use credit cards for payment may also be responsible for a user fee, as set by the Eaton County Clerk up to a maximum of 2% of the transaction amount.

d. User fees shall not be waived on the basis of indigency. Indigent litigants not represented by counsel may file hard copies of papers and pleadings.

6. Service

a. All attorneys, and parties appearing pro se, participating in this pilot program shall provide the court and counsel, where opposing counsel is present, with one e-mail address with the functionality required for the pilot program. All service on opposing counsel shall originate from and be perfected upon this e-mail address.

b. Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail address of opposing counsel. The subject-matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

c. In matters where an attorney represents a party and the opposing side or sides are unrepresented, service by all parties shall be by traditional means, unless otherwise agreed to in writing.

d. The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

i. The parties shall provide the court and opposing parties with one facsimile number with appropriate functionality,

ii. The facsimile number shall serve as the number to which service may be made,

iii. The sender of the facsimile should obtain a confirmation of delivery, and

iv. Parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

e. In mandatory situations, and those where one chooses to voluntarily participate in the pilot program, proof of service shall be submitted electronically to the 56th Circuit Court according to MCR 2.104 and these rules.

7. Format and Form of E-filing and Service

a. An attorney or party may only e-file documents for one case per transaction.

b. All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

c. Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

d. All e-filings, subject to subsection 6(d), shall be served on the parties in the same format and form as submitted to the court.

8. Pleadings, Motions, and Documents not to be E-filed

Documents to be filed under seal (pursuant to court order) shall not be e-filed during the pilot program and must be filed by the traditional methods provided in the MCR. The obligation of the clerk in such an instance shall be governed by § 4 of this administrative order.

9. Official Court Record; Certified Copies

a. For purposes of this pilot program, e-filings are the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

b. Certified or true copies of e-filed documents shall be issued in the conventional manner by the Eaton County Clerk's Office in compliance with the Michigan Trial Court Case File Management Standards.

c. At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d), unless electronic means of long-term retention is approved. Participating attorneys shall provide reasonable assistance in constructing the paper record.

d. At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and public access in a manner consistent with the instructions of the court and court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

a. A party experiencing a technical malfunction with the party's equipment (such as PDF conversion problems or inability to access the pilot program sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot program equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

b. If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 56th Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

a. With respect to any e-filing, the following requirements for personal information shall apply:

i. Social Security Numbers. Full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

ii. Names of Minor Children. Unless named as a party, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

iii. Dates of Birth. An individual's full birth date shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

iv. Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may

be used and the number specified in substantially the following format: XXXXXX1234.

v. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

vi. Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used.

b. Parties wishing to file a complete personal data identifier listed above may:

i. Pursuant to, and in accordance with the MCR and administrative orders, file a motion seeking the court's permission to file a traditional paper version of the document under seal. The court may, in granting the motion to file the document under seal, still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files.

or

ii. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corre-

sponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

c. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

i. Medical records, treatment, and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

vi. Information regarding an individual's cooperation with the government; and

vii. Personal information regarding the victim of any criminal activity.

13. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the state court administrator.

14. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 1, 2011, or further order of the 56th Circuit Court.

SUPREME COURT CASES

UNITED STATES FIDELITY & GUARANTY COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION
(ON REHEARING)
HARTFORD INSURANCE COMPANY OF THE MIDWEST v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION
(ON REHEARING)

Docket Nos. 133466 and 133468. Argued October 1, 2008 (Calendar No. 5). Decided July 21, 2009.

United States Fidelity & Guaranty Company (USF&G) and Hartford Insurance Company of the Midwest (Hartford) filed separate actions in the Oakland Circuit Court seeking declaratory judgments that, under MCL 500.3104, the Michigan Catastrophic Claims Association (MCCA) was required to reimburse them for payments of personal protection insurance benefits above the statutory threshold made to insureds who suffered catastrophic injuries, regardless of whether the charges were reasonable. With respect to USF&G, the court, Steven N. Andrews, J., agreed that the MCCA was required to indemnify USF&G for the actual amount it had paid regardless of whether the charges were reasonable. The MCCA appealed. In the case of Hartford, the court, Rudy J. Nichols, J., ruled that the MCCA could challenge the reasonableness of the charges as a defense to a claim for indemnification, and Hartford appealed. After consolidating the cases, the Court of Appeals, OWENS, P.J., and WHITE and HOEKSTRA, JJ., affirmed with respect to USF&G and reversed with respect to Hartford, holding that MCL 500.3104 unambiguously requires the MCCA to reimburse insurers for the full amount of personal protection insurance benefits exceeding the statutory threshold that the insurer was obligated to pay to its insured, regardless of whether the amount was reasonable. 274 Mich App 184 (2007). The Supreme Court granted leave to appeal. 481 Mich 862 (2008). After hearing oral arguments, the Supreme Court held that, when a member insurer's policy provides coverage only for reasonable charges, the MCCA has the authority to refuse to indemnify unreasonable charges and that, if the policy provides broader coverage, the MCCA must review for compliance with the broader coverage and indemnify claims within that coverage, but it may reject claims in excess of that coverage. 482 Mich 414 (2008). The

plaintiffs filed motions for rehearing, which the Supreme Court granted. 483 Mich 918 (2009).

In an opinion by Justice WEAVER, joined by Chief Justice KELLY and Justices CAVANAGH and HATHAWAY, the Supreme Court *held*:

The indemnification obligation set forth in MCL 500.3104(2) does not incorporate the reasonableness standard that MCL 500.3107 requires between claimants and member insurers. The MCCA's powers are limited to furthering the MCCA's purposes, which do not include determining the reasonableness of claims. Accordingly, the MCCA has the power to adjust only the practices and procedures of its member insurers, not the payment amounts to which claimants and member insurers have agreed.

1. The interpretation of MCL 500.3104(2) requires a determination of how that provision relates to MCL 500.3107 and of how both provisions correspond within the larger statutory scheme. MCL 500.3104(2) requires that the MCCA provide, and each member accept, indemnification for 100 percent of the amount of ultimate loss sustained under personal protection insurance coverages in excess of a statutorily set amount. MCL 500.3107(1)(a), which defines "personal protection insurance benefits," requires that all personal protection insurance benefits claimed and paid between the insurer and the insured must be reasonable. Because the Legislature used the term "coverages" in § 3104 and the term "benefits" in § 3107, it can be inferred that the Legislature intended those terms to have different meanings. Therefore, the definition of "personal protection insurance benefits" in § 3107(1)(a) is not equivalent to the definition of "personal protection insurance coverages" in § 3104(2).

2. The Legislature limited the exceptions to "coverages" narrowly, which indicates that the term "coverages" is a broader term than "benefits." Because "coverages" is never given a more restrictive definition elsewhere in the statute, the word must be afforded its ordinary, everyday meaning. Dictionaries define "coverage" as the extent of protection afforded by an insurance policy, as protection against a risk or risks specified in an insurance policy, as the risks within the scope of an insurance policy, and as the amount and extent of risk covered by an insurer. The term "coverages" in MCL 500.3104 is positioned just after "ultimate loss," which is defined as the actual loss amounts that a member is obligated to pay and that are paid or payable by the member. The obligation of the insurer is to fulfill its duty by honoring its contractual coverages. The duty to perform the contract relates back to the ultimate loss insofar as the ultimate loss includes payment of the obligation, i.e., the total contracted amount.

Consequently, the MCCA must reimburse the insurers for 100 percent of the ultimate loss, which reflects the amount to which the insurer and the insured agreed, and subject to personal protection insurance coverage. The ultimate loss specifically refers to coverage, which is broader than benefits and is not statutorily limited to reasonable payments.

3. The relationship between the MCCA and its members is not subject to the reasonableness requirements of MCL 500.3107 because the MCCA is not a no-fault insurer of its member companies and the member companies are not injured persons entitled to no-fault indemnification. Instead, MCL 500.3104(2) requires the MCCA to indemnify, not to insure or to reinsure, the members for personal protection insurance payments that exceed the statutory threshold. The MCCA has the power under MCL 500.3104(7) to protect against unreasonable payments by assessing the adequacy of the procedures or practices of members that anticipate needing indemnification before a settlement has been reached.

4. MCL 500.3104(8)(g) grants the MCCA the limited power to further its purpose of prompt and efficient indemnification of its members. That power does not extend to declining to indemnify unreasonable amounts.

Affirmed.

Justice Young, joined by Justice Corrigan, dissenting, disagreed with the Court's decision to grant rehearing when only the composition of the Court, and not the facts, arguments, or legal rationale, had changed since the original opinion was issued. He stated that the decision to grant rehearing under these circumstances ignored precedent more than a century old. Consistent with the original opinion and based on the text of MCL 500.3104(2), he would hold that when a member insurer's policy only provides coverage for "reasonable charges," the MCCA has the authority to refuse to indemnify unreasonable charges. He dissented because the majority's decision was based on neither the controlling statute nor the majority's own definitions of "coverages." Moreover, its holding would have the effect of giving insurers an incentive to make unreasonable settlements and pass the enormous costs of those onto the Michigan citizens who must purchase no-fault automobile insurance. He also disagreed with the majority's statement that the MCCA is statutorily authorized to adjust a member's practices and procedures but not claims.

Justice Markman, dissenting, concurred fully with the discussion in part IV of Justice Young's dissenting opinion, which sets forth an analysis supporting the conclusion that, under the text of

MCL 500.3104(2), when a member insurer's policy only provides coverage for "reasonable charges," the MCCA has the authority to refuse to indemnify "unreasonable charges."

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — CATASTROPHIC CLAIMS — INDEMNIFICATION — UNREASONABLE CHARGES.

The Michigan Catastrophic Claims Association may not refuse to indemnify unreasonable charges for personal protection insurance benefits because the statutory provision setting forth its indemnification obligation does not contain a standard of reasonableness (MCL 500.3104[2]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — CATASTROPHIC CLAIMS — INDEMNIFICATION — POWERS OF THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION.

The statutory powers of the MCCA to adjust the practices and procedures of member insurers do not encompass adjusting the payment amount to which a claimant and a member insurer have agreed (MCL 500.3104[7]).

3. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — CATASTROPHIC CLAIMS — INDEMNIFICATION — UNREASONABLE CHARGES — POWERS OF THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION.

The limited statutory power of the MCCA to further its purpose of prompt and efficient indemnification of its members does not extend to declining to indemnify unreasonable charges (MCL 500.3104[8][g]).

Plunkett Cooney (by *Jeffrey C. Gerish* and *Gregory Gromek*) for United States Fidelity & Guaranty Company.

Stark Reagan, P.C. (by *Ava K. Ortner*), and *Dykema Gossett PLLC* (by *Joseph K. Erhardt*, *Jill M. Wheaton*, and *K. J. Miller*) for the Michigan Catastrophic Claims Association.

Miller & Tischler, P.C. (by *Milea M. Vislosky*), for Michael Migdal.

Secrest Wardle (by *Janet Callahan Barnes* and *John H. Cowley, Jr.*) for Hartford Insurance Company of the Midwest.

Amici Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), and *Sinas Dramis Brake Boughton & McIntyre PC* (by *George T. Sinas* and *Steven A. Hicks*) for the Coalition Protecting Auto No-Fault.

Hackney, Grover, Hoover & Bean, PLC (by *John P. Lewis*), for State Farm Mutual Automobile Insurance Company.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *William A. Chenoweth*, Assistant Attorney General, for the Commissioner of the Office of Financial and Insurance Regulation.

John A. Lydick for the Insurance Institute of Michigan.

ON REHEARING

WEAVER, J. This Court originally granted leave to appeal to consider whether MCL 500.3104(2) obligates the Michigan Catastrophic Claims Association (MCCA) to reimburse a member insurer for personal protection insurance (PIP) benefits paid to a claimant without regard to the reasonableness of the member insurer's payments of PIP benefits. This Court issued an opinion reversing the Court of Appeals and remanding for further proceedings, while holding that "when a member insurer's policy only provides coverage for 'reasonable charges,' the MCCA has authority to refuse to indemnify unreasonable charges."[1] Subsequently, plaintiffs United States Fidelity & Guaranty Company and Hartford Insurance Company of the Midwest filed mo-

[1] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 482 Mich 414, 417; 759 NW2d 154 (2008).

tions for rehearing. We granted plaintiffs' motions for rehearing, and these cases were resubmitted for decision without further briefing or oral argument.[2]

We now hold that the indemnification obligation set forth in MCL 500.3104(2) does not incorporate the reasonableness standard that MCL 500.3107 requires between claimants and member insurers. Furthermore, the powers granted to the MCCA in § 3104(7) are limited to adjusting the "practices and procedures" of the member insurers and do not encompass adjustment to the payment amount agreed to between claimants and member insurers. Moreover, we hold that the power granted to the MCCA under MCL 500.3104(8)(g) is limited to furthering the purposes of the MCCA and that determining reasonableness is not one of its purposes. Finally, although the MCCA has no right to directly challenge the reasonableness of a claim, the no-fault statute does provide the MCCA with safeguards against negligent actions of member insurers. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

UNITED STATES FIDELITY & GUARANTY CO v MCCA

In the first case in these consolidated appeals, Daniel Migdal was injured in a 1981 car accident in which he sustained catastrophic injuries. His injuries included a traumatic brain injury with cerebral spastic quadriplegia, severe oral motor apraxia, and dysphasia. Because of the extent of the injuries, Daniel was prescribed, and received, 24-hour-a-day nursing care. In 1988, Michael Migdal (Mr. Migdal), Daniel's father and the conservator of Daniel's estate, sued the no-fault insurance

[2] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 483 Mich 918 (2009).

provider, United States Fidelity & Guaranty Company (USF&G), to recover expenses paid for Daniel's care. In 1990, the parties entered into a consent judgment. Pursuant to the judgment, USF&G paid Mr. Migdal $35,000 in exchange for a release from all contractual liability for nursing care provided before May 10, 1989. Additionally, USF&G agreed to pay $17.50 an hour for Daniel's home nursing care for the following year.[3] The payments would be made regardless of whether Daniel's parents provided the nursing care or a third party was brought in to provide the care. The hourly rate, fixed for the first year after the judgment, was subject to an annual increase of 8.5 percent. The increased rate would be compounded based on the previous year's rate.

Pursuant to the consent judgment, USF&G paid Mr. Migdal the consented-to hourly wage.[4] Once the amount paid to Mr. Migdal had reached the statutory threshold amount of $250,000,[5] the MCCA began to reimburse

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[3] Mr. Migdal created a company to manage Daniel's care. This company acted as an intermediary that used the benefit payments from USF&G to pay the hired nurses who cared for Daniel and to pay Mr. Migdal for his efforts in Daniel's care. The judgment contained a provision stating that if Daniel's condition substantially changed, the court retained jurisdiction and could determine whether a reduction or increase in the payments was "warranted."

[4] Mr. Migdal testified that his duties included reading papers concerning business management and medical advances, checking and providing maintenance of Daniel's equipment, keeping the books, paying the nurses, and shopping for necessary items for Daniel's care.

[5] MCL 500.3104(2) reads, in pertinent part:

> [T]he association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence . . . .

At the time of both accidents involved in these consolidated appeals, the threshold amount was $250,000.

USF&G for payments made to Mr. Migdal that exceeded the threshold. However, after the hourly rate had increased significantly with the passage of time, the MCCA eventually refused to reimburse USF&G for amounts that USF&G paid Mr. Migdal under the consent judgment, on the ground that the amounts were unreasonable. In 2003, USF&G filed a complaint in the Oakland Circuit Court for a declaratory judgment that the MCCA must reimburse USF&G for the total amount that USF&G paid to Mr. Migdal under the consent judgment, regardless of the reasonableness of the amount. At the time, USF&G was paying $54.84 an hour to Mr. Migdal for Daniel's nursing care.[6] The MCCA sought to only be required to reimburse USF&G at a rate of $22.05 an hour, arguing that the agreed-upon rate of $54.84 an hour was unreasonable and, therefore, the MCCA should not have to reimburse USF&G for the total amount. Meanwhile, USF&G sought to have the consent judgment with Mr. Migdal revised, arguing that circumstances had changed when Mr. Migdal hired a third party to care for Daniel instead of providing the nursing care himself. Mr. Migdal filed a motion for summary disposition for failure to state a claim upon which relief could be granted. The court granted Mr. Migdal's motion.[7]

Likewise, the MCCA moved for summary disposition. It contended that there was no question of material fact that the payments made by USF&G to Mr. Migdal were unreasonable. Moreover, the MCCA argued that the no-fault act only required reimbursement of payments

[6] Mr. Migdal paid $32 an hour of this amount to the nurses (including benefits) and kept the rest as compensation for his work.

[7] USF&G did not appeal that decision. We therefore express no opinion on whether the consent judgment would have been subject to judicial modification on the ground that the payment amount it called for had become unreasonable with the passage of time.

that are reasonable. In a countermotion for summary disposition, USF&G argued that the no-fault act required the MCCA to reimburse it for the full amount paid to Mr. Migdal, despite any unreasonableness regarding the amount paid. Alternatively, USF&G argued that there was a question of material fact concerning the "unreasonableness" of the consent judgment.

The trial court granted USF&G's motion for summary disposition, ruling that the MCCA must reimburse USF&G for its "ultimate loss,"[8] including the entire amount that USF&G had to pay Mr. Migdal, regardless of whether the amount paid was reasonable. The trial court denied the MCCA's motion for summary disposition. The trial court entered a judgment requiring the MCCA to reimburse USF&G in the amount of $1,725,072 under the no-fault act and holding the MCCA liable for future payments consistent with the consent judgment. The parties agreed to stay the enforcement of the order while the MCCA appealed by right in the Court of Appeals.

HARTFORD INS CO v MCCA

In the second case of these consolidated appeals, Robert Allen was injured in a 2001 car accident in which he sustained catastrophic injuries. His injuries included right-sided pleuritic effusion, brain injuries, quadriparesis, bilateral frozen shoulder, and cardiopathy. Because of the extent of the injuries, Allen was prescribed, and received, 24-hour-a-day care by a licensed nurse. Hartford Insurance Company of the Midwest (Hartford), Allen's no-fault insurer, initially paid $20 an hour for the nurse. In 2003, Hartford agreed to pay an increased rate of $30 an hour for Allen's care.

[8] MCL 500.3104(2).

Soon thereafter, Hartford's payments for Allen's care exceeded the $250,000 statutory threshold.

The MCCA refused to reimburse Hartford for any payments above $20 an hour for the services rendered. Hartford filed a complaint for a declaratory judgment that would require the MCCA to pay Hartford $571,847.21 as reimbursement for payments exceeding the no-fault threshold. Additionally, Hartford sought a declaration that the MCCA must reimburse Hartford for the total payments above the $250,000 threshold, regardless of the reasonableness of the payments. After the initial filing, Hartford moved for summary disposition, arguing that the no-fault act required the MCCA to reimburse Hartford for the entire amount paid to Allen that exceeded the threshold, regardless of the reasonableness of that amount. The MCCA argued that it only had to reimburse Hartford for reasonable payments and that there was insufficient discovery concerning the reasonableness of the amount of the payments. The circuit court ruled that reasonableness was an element in determining how much the MCCA must reimburse Hartford and that there was insufficient discovery to determine if the payments were reasonable. Hartford immediately appealed the trial court's holding requiring the element of reasonableness to be considered.

THE COURT OF APPEALS' DECISION

The Court of Appeals consolidated the USF&G and Hartford cases and held that "MCL 500.3104 does not incorporate a 'reasonableness' requirement and requires the MCCA to reimburse insurers for the *actual* amount of PIP benefits paid in excess of the statutory

threshold."[9] (Emphasis in the original.) The MCCA sought leave to appeal in this Court, and this Court granted leave.[10] This Court issued an opinion reversing the Court of Appeals and remanding for further proceedings, while holding that "when a member insurer's policy only provides coverage for 'reasonable charges,' the MCCA has authority to refuse to indemnify unreasonable charges."[11] Subsequently, plaintiffs United States Fidelity & Guaranty Company and Hartford Insurance Company of the Midwest filed motions for rehearing. We granted plaintiffs' motions for rehearing and this case was resubmitted for decision without further briefing or oral argument. 483 Mich 918 (2009).[12]

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[9] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 192; 731 NW2d 481 (2007).

[10] 481 Mich 862 (2008).

[11] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 482 Mich 414, 417; 759 NW2d 154 (2008).

[12] Justices Corrigan and Young were simply shown as denying the motions for rehearing. However, Justice Young, in his dissent joined by Justice Corrigan, now takes the opportunity well after the motions for rehearing have been decided to attack the remaining justices who did not vote to retain this Court's earlier decision.

The dissent erroneously asserts that the justices voting to grant rehearing erred because *Peoples v Evening News Ass'n*, 51 Mich 11, 21; 16 NW 185 (1883), held that this Court is precluded from granting rehearing when the composition of the Court has changed, absent any new arguments from the parties in the cases. However, contrary to the dissent's assertions, this Court merely stated in *Peoples* that a change in the composition of this Court cannot be the *basis* for granting rehearing.

Accordingly, if the composition of the Court changes, and the composition becomes such that a majority of the Court sees a reason to grant rehearing, the majority is not precluded under *Peoples* from granting rehearing. If, for instance, four justices on the newly composed Court concluded that the challenged opinion was erroneous, those justices can vote to grant rehearing. The same holds true whether the deciding vote is a new justice who joined the Court after the challenged opinion was

II. STANDARD OF REVIEW

Statutory interpretation is a question of law, which this Court reviews de novo. *In re Investigation of March 1999 Riots in East Lansing (People v Pastor)*, 463 Mich 378, 383; 617 NW2d 310 (2000). This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

III. ANALYSIS

The issue before this Court involves how much of a member insurer's coverages the MCCA must indemnify in the event of a catastrophic injury. Specifically, is the MCCA liable for reimbursement of PIP payments based on potentially unreasonable claims?

The outcome of these cases depends on this Court's interpretation of the language in MCL 500.3104. An overarching rule of statutory construction is "that this Court must enforce clear and unambiguous statutory provisions as written." *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 721; 449 NW2d 660 (1989)

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released or whether the deciding vote comes from a justice who signed the challenged opinion and changed his or her mind after further consideration.

This practice is consistent with MCR 2.119(F)(3), which creates a "palpable error" standard for rehearing cases. It is up to the moving party to show palpable error that would lead to a different disposition in the case. If a majority of the Court is convinced by the moving party, the Court has the discretion to grant rehearing. Furthermore, while MCR 2.119(F)(3) states that a motion for rehearing will generally not be granted if the motion only presents the same arguments decided in the original disposition of the case, MCR 2.119(F)(3) explicitly refrains from "restricting the discretion of the court" to grant rehearing.

Accordingly, we are not persuaded by the dissent's attempts to discredit this Court's order that granted rehearing in this case.

(quotation marks omitted). "If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, "what is 'plain and unambiguous' often depends on one's frame of reference." *Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 194; 224 NW2d 255 (1974). In order to ascertain this frame of reference, the contested provisions must be read in relation to the statute as a whole and work in mutual agreement. *In re Certified Question*, 433 Mich at 722. See also *State Treasurer v Wilson*, 423 Mich 138, 144; 377 NW2d 703 (1985).

Additionally, the frame of reference shares a deep nexus with the intent of the Legislature. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004), quoting *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Fundamentally, "[t]his task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of [the Legislature's] intent . . . ." *Sun Valley*, 460 Mich at 236 (citation and quotation marks omitted). This Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Id*. at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley*, 460 Mich at 237.

In interpreting § 3104, this Court first must determine how § 3104(2) corresponds with § 3107 and how these two provisions correspond within the entire statutory scheme. Section 3104(2) requires that the MCCA "shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence . . . ."[13] Section 3107(1)(a) defines "personal protection insurance *benefits*" as "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation." This provision requires that all PIP benefits claimed and paid between the insurer and the insured must be reasonable. The MCCA argues that this Court should incorporate the § 3107 definition of "benefits" into § 3104(2) where § 3104(2) refers to "coverages." However, we decline to do so because the phrase "personal protection insurance *benefits*" has a distinct meaning from the phrase "personal protection insurance *coverages*" that is found in § 3104(2).

When the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, "the use of different terms within similar statutes generally implies that different meanings were intended." 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 46:6, p 252. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word. Therefore, we disagree with the MCCA and hold that the definition of personal protection insurance *benefits*

[13] The amounts are statutorily set to increase over time. At the time of both accidents, the threshold amount was $250,000. In 2008, the threshold amount was $440,000. See MCL 500.3104(2)(a) to (k).

found in § 3107(1)(a) (including the reasonableness standard) is not equivalent to the definition of personal protection insurance *coverages* in § 3104(2).

The distinctive use of the term "coverages" is important. *LeBlanc v State Farm Mut Auto Ins Co*, 410 Mich 173, 204; 301 NW2d 775 (1981) (" 'Coverage', a word of precise meaning in the insurance industry, refers to protection afforded by an insurance policy, or the sum of the risks assumed by a policy of insurance."). Although the terms "benefits" and "coverages" are related because of their close proximity in the statute,[14] the proximity of these two terms does not mean that they are synonymous.

Section 3107 excludes from the definition of "allowable expenses" within PIP "coverage" hospital charges in excess of reasonable and customary semi-private room charges and funeral and burial expenses in amounts specified in the policy (subject to a range specified in that section). This leaves all other charges open to PIP "coverage." The fact that the Legislature limited the exceptions to "coverage" so narrowly indicates that the term "coverage" is a broader term than "benefits." Moreover, because "coverages" is never given a more restrictive definition elsewhere in the

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[14] MCL 500.3107(1) provides, in pertinent part:

> Except as provided in subsection (2), personal protection insurance *benefits* are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance *coverage* shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations . . . or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00. [Emphasis added.]

statutes, the word must be afforded its ordinary, everyday meaning. *Sun Valley*, 460 Mich at 237 ("The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended."). In the grammatical context, the meaning of "coverages" is its common meaning, limited only by the specific statutory exceptions.

"Coverage" is defined in dictionaries as the "[e]xtent of protection afforded by an insurance policy [or the] amount of funds reserved to meet liabilities,"[15] as "protection against a risk or risks specified in an insurance policy,"[16] as "the risks within the scope of an insurance policy,"[17] and as the "amount, and extent of risk covered by insurer."[18] Under the common meaning of "coverage," the contractual liability amount that an insurer agrees to pay an insured is considered a part of the insurer's coverage. USF&G and Hartford paid funds pursuant to a consent judgment and a settlement agreement with the respective insureds. This contractual liability, or coverage, owed by each insurer is the total amount agreed to between the original contracting parties. The reasonableness of the agreed payment amount is not a factor.

The meaning of "coverages" in MCL 500.3104 becomes clearer after considering " 'its placement and purpose in the statutory scheme.' " *Sun Valley*, 460 Mich at 236, quoting *Bailey*, 516 US at 145. In the statute, "coverages" is positioned just after "ultimate loss." "Ultimate loss" is statutorily defined as the "actual loss amounts that a member is *obligated* to pay and that are paid or payable by the member . . . ." MCL

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[15] *Webster's II New College Dictionary* (1995).

[16] *Random House Webster's College Dictionary* (2001).

[17] Black's Law Dictionary (7th ed).

[18] Black's Law Dictionary (5th ed).

500.3104(25)(c) (emphasis added). The obligation of the insurer is to fulfill its duty by honoring its contractual coverages. The duty to perform the contract relates back to the ultimate loss insofar as the ultimate loss includes payment of the obligation, i.e., the total contracted amount. Consequently, the MCCA must reimburse the insurers for 100 percent of the ultimate loss, which reflects the amount to which the insurer and the insured agreed, and subject to PIP coverage. The ultimate loss specifically refers to coverage, which is broader than benefits and is not statutorily limited to reasonable payments.[19]

Moreover, the MCCA is not a no-fault insurer of its member companies, and the member companies are not injured persons entitled to no-fault indemnification. Thus, the relationship between the MCCA and its members is not subject to the reasonableness requirements found in MCL 500.3107. Rather, the Legislature provided in § 3104(2) that the MCCA would "indemnify" the insuring members for PIP payments. The Legislature did not state that the MCCA would "insure" or "reinsure" the members for amounts greater than the threshold. Black's Law Dictionary (5th ed) defines "indemnify" as "[t]o restore the victim of a loss, in whole or in part, by payment . . . ; to secure against loss or damage . . . ." Indemnification is not a contingent plan like an insurance plan. Instead, it is a set security

[19] The MCCA argues that if there is not a reasonableness factor for it to enforce, the member insurers will have no incentive to make reasonable settlements that do not exceed the statutory threshold amount because the insurers will not be liable to pay anything beyond the threshold amount. However, one incentive comes from higher premiums paid to the MCCA. See MCL 500.3104(7)(d) (requiring that the MCCA assess its member companies an annual premium on each of their no-fault policies written in Michigan). If all the individual members act in a manner that does not regard the reasonableness of their settlements, then insurance premiums will increase greatly.

meant to assist against certain circumstances. Here, those circumstances arise when the PIP amount contracted by the insurer exceeds the statutory threshold.

Section 3401(1) states that the MCCA is "not subject to any laws . . . with respect to insurers." Thus, the MCCA is not a no-fault insurer, and consequently it is also not a reinsurer. Because the MCCA is not a no-fault insurer, but, rather, an indemnitor of no-fault insurers for benefits in excess of the statutory threshold, § 3107 does not directly bind the MCCA; it only binds the insurer members and the insured. Section 3107 "makes both reasonableness and necessity explicit and necessary elements of a *claimant's* [insured's] recovery . . . ." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990) (emphasis added). Specifically, it is the insurance company that has the right to deny a claim (or part of a claim) for unreasonableness under § 3107. The *insured* then has the burden to prove that the charges are in fact reasonable. See, generally, *Nasser*, 435 Mich at 49, *Manley v Detroit Automobile Inter-Ins Exch*, 425 Mich 140; 388 NW2d 216 (1986), and *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577; 543 NW2d 42 (1995). Given that the established burden of proof is on the insured, it is counterintuitive to conclude that the member insurance company would benefit from not having the burden of proof in one instance against an insured, but having the burden in another instance against the MCCA.

The MCCA maintains that the foregoing statutory constructions will lead to higher costs to insureds and will be a disincentive for member insurers to keep payments reasonable. These fears are unfounded. The MCCA is an unincorporated nonprofit association, whose purpose is to provide insurers with indemnification for PIP policies that exceed a certain threshold. See

MCL 500.3104(1). The Legislature created the MCCA "in response to concerns that Michigan's no-fault law provision for unlimited [PIP] benefits placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims." *In re Certified Question*, 433 Mich at 714. The MCCA maintains that it should have the ability to unilaterally stop making indemnification payments to a member when it determines that the claim payments are unreasonable. Yet, the MCCA acknowledges that a member can take the MCCA to court over a reasonableness dispute, which would leave a finder of fact as the ultimate authority over whether the payments are reasonable.

In essence, under the MCCA's preferred outcome, when a member insurer makes an agreement with an insured (often in a litigation setting, whether it be an arbitration hearing, consent judgment, or declaratory judgment), the member must then sue the MCCA if the MCCA finds that the payment is unreasonable. If this Court were to accept the MCCA's argument, the logical consequence would be that member insurers would be reluctant to settle with the claimant. Member insurers might then force a jury trial with every catastrophically injured claimant in order to secure a verdict with a "reasonable" stamp on the result. This outcome goes against the legislative purpose of ensuring efficient and quick recovery for claimants in the no-fault system. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978) ("The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses.").

In response to the MCCA's concerns, it should be pointed out that the MCCA is not without a safeguard to protect against unreasonable payments. The Legis-

lature specifically laid out powers that the MCCA can exercise to guard against unreasonable settlements of catastrophic claims. MCL 500.3104(7)(b) states that the MCCA shall

> [e]stablish procedures by which members shall promptly report to the association each claim that, on the basis of the injuries or damages sustained, may reasonably be anticipated to involve the association if the member is ultimately held legally liable for the injuries or damages. Solely for the purpose of reporting claims, *the member shall in all instances consider itself legally liable for the injuries or damages*. The member shall also advise the association of subsequent developments likely to materially affect the interest of the association in the claim. [Emphasis added.][20]

This statutory language requires and empowers the MCCA to establish procedures to protect itself from unreasonable settlements in all cases involving claims that may exceed the threshold and consequently affect the MCCA. The MCCA's plan of operation likewise echoes these statutory requirements.[21] This language enables the MCCA to establish procedures that will enable it to exercise appropriate control over settlements whenever the member reasonably anticipates that the claim will involve the MCCA.

Only then, not after the claimant and member insurer have reached a settlement, can the MCCA exer-

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[20] Section 3104 includes numerous other rules for the MCCA, such as membership requirements, liability, and creation of a "plan of operation."

[21] Art X, § 10.01 of the plan of operation provides in part:

> Members shall report to the Association such information as the Board may require on forms prescribed by the Board: (a) As soon as practicable after the loss occurrence, Members shall report each claim which, on the basis of the injuries or damages sustained, may reasonably be anticipated to result in a Reimbursable Ultimate Loss, and for purposes of reporting the Member shall consider itself legally liable for the injuries and damages.

cise control over the settlement process. Under MCL 500.3104(7)(g), the MCCA must

> [e]stablish procedures for reviewing claims procedures and practices of members of the association. *If the claims procedures or practices of a member are considered inadequate to properly service the liabilities of the association, the association may undertake* or may contract with another person, including another member, *to adjust or assist in the adjustment of claims* for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member. [Emphasis added.]

Thus, when § 3104(7)(g) is read in conjunction with § 3104(7)(b), the outcome is that the MCCA is required to review those reports by members that anticipate needing indemnification and to assess the adequacy of the *procedures or practices* of the member.[22] Upon a finding of inadequacy, the MCCA can adjust the *practices or procedures* of the member.[23] One of the key protections here is that the MCCA has the power and

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[22] The MCCA argued that because part of § 3104(7)(g) uses the term "may" instead of "must" in describing some of its potential powers, the MCCA has greater power than what directly follows in the statute to limit or control the individual member insurers. The MCCA wishes to conclude that since the section does not set forth a duty to act in a specific way (e.g., review claims), it allows the MCCA to act how *it* wants regarding member claims, including questioning their reasonableness. This is erroneous. The premise and purpose of the MCCA is to indemnify insurers for payments beyond the threshold amount, so that insurance firms of all sizes can compete in Michigan's no-fault market without fear of sustaining disproportionate catastrophic loss claims.

[23] The plan of operation also echoes the statute in this regard:

> If a Member or 3103 Member refuses to timely submit the reports or information required of it pursuant to Section 10.01 or otherwise, or if the Board should determine that the reports and information submitted by a Member or 3103 Member are unreliable or incomplete, the Board may, at the member's expense, direct that an authorized representative of the Association (which may

duty to adjust *only* "procedures and practices" of the member that produce an unreasonable payment amount; the power does not include the power to adjust the amount after a settlement has been reached.[24] The MCCA has the power to step in before a settlement has been reached and adjust situations that it anticipates might otherwise expose it to unreasonable indemnification costs. By requiring submission of proposed settlement agreements for approval, the MCCA can protect itself against later having to pay unreasonable claims from member insurers. The exercise of these powers is the MCCA's protection against a member's neglect of its duties.

Finally, the MCCA argues that § 3104(8)(g) gives it the power to question reasonableness regardless of the statute's other provisions. Specifically, § 3104(8)(g) allows the MCCA to "[p]erform other acts not specifically enumerated in this section that are necessary or proper to accomplish the purposes of the association and that

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be another member) shall audit and inspect such member's records and compile the required information and data. [Art X, § 10.02.]

[24] Although § 3104(7)(g) states that the MCCA may "adjust or assist in the adjustment of claims," the practical effect of § 3104(7)(g) is that only the MCCA is able to prescribe procedures and practices by which to ensure the reasonableness of the amounts that members agree to pay to claimants. When the MCCA asserts its power to adjust or assist in the adjustment of a claim, the MCCA effectively steps into the shoes of the member insurer. The claim that the MCCA reviews for adjustment purposes is the insured's claim with the member insurer, not the member insurer's reimbursement claim with the MCCA. Accordingly, the MCCA, standing in the shoes of the member insurer, is limited to the member insurer's power to review the insured's claim for reasonableness as spelled out in the member insurer's policy, a settlement agreement, or a consent judgment. Thus, even when the MCCA assists in or assumes control over the claims adjustment process, the amount payable is still dictated by the amount that the member insurer is "obligated" to pay to the insured when a settlement already has been reached.

are not inconsistent with this section or the plan of operation." However, this section does not give the MCCA carte blanche to simply avoid a member insurer's agreement that it finds unreasonable. The power granted under § 3104(8)(g) is limited to accomplishing the "purposes of the association." More importantly, the exercise of this power cannot be "inconsistent with this section or the plan of operation." *Id*. The plan of operation created pursuant to § 3104(17) must be "*consistent* with the objectives and provisions of this section, which shall provide for the economical, fair, and nondiscriminatory administration of the association *and for the prompt and efficient provision of indemnity*." MCL 500.3104(17) (emphasis added).

Section 3104(8)(g) allows the MCCA to fulfill the specific requirements of the statute. Accordingly, we interpret § 3104(8)(g) as granting the MCCA the limited power to further its purpose of prompt and efficient indemnification of its members. To interpret that section as granting any further power, such as the power to decline indemnification on the basis of the reasonableness of the indemnification amount, would be inconsistent with the Legislature's intent.

IV. RESPONSE TO THE DISSENT

The dissent raises the concern that a decision in favor of plaintiffs in this case will result in substantially increased insurance costs. Certainly, insurance costs are a critical concern, but they are a policy concern that belongs to the Legislature. Nonetheless, we observe that the concern appears highly speculative and, indeed, unfounded. There is no evidence that insurers have engaged or will engage in slack negotiations. It bears mentioning here that there is no indication that the settlements in these cases were unreasonable when made.

The dissent bases its concern on an affidavit from defendant's executive director in which she refers to an estimate provided by consultants to defendant. No basis is given in the affidavit for the estimated increase in costs. And there is reason to wonder about this estimate, at least inasmuch as it might be based on an anticipated decision from this Court.

First, there is no evidence that defendant has routinely or even occasionally challenged the reasonableness of insurers' settlements with their insureds until very recently. It is difficult to understand how it will cost defendant extravagant sums to give up a practice it has only recently begun. Second, it is unknown whether the actuarial assessment factored in the effect of defendant's potential use of the cost-containment procedure actually provided by the Legislature in MCL 500.3104(7)(g).

As mentioned, the Legislature has provided that "[i]f the claims procedures or practices of a member are considered inadequate to properly service the liabilities of the association, the association may undertake . . . to adjust or assist in the adjustment of claims for the member on claims that create a potential liability to the association . . . ." MCL 500.3104(7)(g). There is no evidence that the actuarial assessment considered the effect of defendant's implementation of this legislatively provided cost-savings mechanism.

The dissent additionally fails to recognize that there is a compelling policy reason to reject defendant's claim that it may review settlements for reasonableness: namely, to limit litigation and promote settlements. This Court has long recognized that "[t]he goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain eco-

nomic losses." *Nelson v Transamerica Ins Services*, 441 Mich 508, 514; 495 NW2d 370 (1992) (citation and quotation marks omitted). Additionally, this Court has stated that "[t]he act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of damages suffered in motor vehicle accidents." *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 568; 302 NW2d 537 (1981). The ability of insurers to settle claims is essential to meeting these goals. Yet, if defendant can reexamine settlements of reasonableness long after they are made, then insurers will be very reluctant to make settlements. Further, a new layer of litigation for after-the-fact reasonableness assessments, such as this one, would be inevitable. There is no evidence that the actuarial assessment on which the dissent relies has accounted for the substantial increase in litigation costs that would result if this Court allows defendant the extrastatutory power to question settlements for reasonableness after they are made.

But, again, these are policy concerns best addressed by the Legislature. It appears that the Legislature has indeed balanced these concerns in the provisions of MCL 500.3104, and there is no reason for this Court to apply a strained construction to the statutes to achieve a goal contrary to the purposes of the no-fault act. In the unlikely event that insurers become milquetoast negotiators, defendant has the statutorily provided protection to remedy the situation.

V. CONCLUSION

We hold that the indemnification obligation set forth in § 3104(2) does not incorporate the reasonableness standard that § 3107 requires between claimants and member insurers. Furthermore, the powers granted to

the MCCA in § 3104(7) are limited to adjusting the "practices and procedures" of the member insurers and do not encompass adjustment to the payment amount agreed to between claimants and member insurers. Finally, we hold that the power granted to the MCCA under § 3104(8)(g) is limited to furthering the purposes of the MCCA, and that determining reasonableness is not one of its purposes.

Accordingly, we affirm the Court of Appeals holding that the MCCA must reimburse its member insurers 100 percent of the ultimate loss exceeding the statutory threshold for claims without a reduction based on its unilateral assessment of the reasonableness of the amount.

Affirmed.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with WEAVER, J.

YOUNG, J. (*dissenting*). I respectfully dissent.

On December 29, 2008, this Court decided these cases.[1] Today, just a few months later, a new majority[2] reverses that decision and it does so without even affording the parties an opportunity to brief and argue why this reversal is warranted. Although not relevant to my analysis of the substantive issue in these cases,[3] the costs that the majority's decision will impose on Michigan drivers is relevant to assessing the majority's hurried approach and policy-based reversal of this

[1] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 482 Mich 414; 759 NW2d 154 (2008) (hereinafter *USF&G I*).

[2] I note that the majority in this case is the new philosophically aligned majority: Justices WEAVER, CAVANAGH, and HATHAWAY and Chief Justice KELLY.

[3] See *USF&G I*, *supra* at 432 n 32.

Court's prior decision. As I will discuss later, the majority's decision will cause every Michigan resident who owns and insures an automobile to pay a 19 percent higher annual surcharge premium for mandatory catastrophic coverage. The cost of the majority's decision to those with insured automobiles will be an estimated $693.8 million more for the coming year alone.[4]

I. WHAT CHANGED?

The facts have not changed. The text of the statute at issue has not changed. The parties' arguments have not changed. And the rationale advanced in the opinions of this Court has not changed. Yet, within a matter of months, a decision of this Court, thoughtfully briefed, argued, and considered by seven justices, is no longer worth the paper it was written on. Even the casual observer, however, does not really need to ask why. The reason is obvious: On January 1, 2009, the composition of this Court changed.

II. WHY IS THIS CASE BEING REHEARD?

This case was argued on October 1, 2008. On November 4, 2008, Justice Hathaway defeated then-Chief Justice Taylor in the election for his seat on this Court. This case was decided on December 29, 2008, with former Chief Justice Taylor casting his vote with the majority.

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[4] In response to the motions for rehearing, the Michigan Catastrophic Claims Association (MCCA) has conducted an actuarial assessment to detail the expected increase in auto insurance premiums that reversal of our original decision will produce—19 percent more in catastrophic claims premiums to be precise. See the affidavit of Gloria Freeland in support of appellant's supplement to its answer to appellee's motion for rehearing, attached hereto as an appendix.

The new majority's opinion today offers no new rationale or argument. In fact, it is merely an extended quotation of Justice WEAVER's former dissent.

For over a century this Court has adhered to the principle that a motion for rehearing should be denied *unless* a party has raised an issue of fact or law that was not previously considered but which may affect the outcome.[5] Indeed, this Court codified that principle in our court rules.[6]

As Justice WEAVER's former dissent in these cases and the majority's new opinion make obvious, the parties have not raised a new issue of fact or law to merit rehearing. The only difference is in the membership of this Court. As early as 1883, this Court had the wisdom to realize that such a change is not a proper ground for rehearing. In *Peoples v Evening News Ass'n*,[7] this Court's opinion on a motion for rehearing stated in its entirety:

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[5] See *Nichols, Shepard & Co v Marsh*, 62 Mich 439, 440; 29 NW 37 (1886); *Thompson v Jarvis*, 40 Mich 526, 526 (1879).

[6] See MCR 2.119(F)(3), which provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The new majority states that MCR 2.119(F)(3) "creates a 'palpable error' standard for rehearing cases." *Ante* at 12 n 12. The actual standard created is: "a palpable error *by which the court and the parties have been misled* . . . ." Neither the parties nor the new majority suggest that this Court was previously misled. Plaintiffs and the new majority simply disagree with this Court's prior opinion for the reasons previously stated in the flawed analysis of Justice WEAVER's dissent.

[7] 51 Mich 11; 16 NW 185 (1883).

> This case having been heard and decided when three judges only were sitting, and a change in the Court having taken place and a further change being [about] to occur on the first of January, a motion is now made for a rehearing at the next January term before the full Court as it will then be constituted.
>
> *Held*, unanimously, that a rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place or is about to occur.[8]

By ordering rehearing simply because a change in the Court has taken place, the new majority has overruled the longstanding and clear principle of *Peoples*.[9] Will any change in an assigned judge now justify the reopening of a predecessor's ruling?

It is apparent that the new majority feels unencumbered by such principles—even one that has endured for more than 100 years. And, perhaps, its members no longer feel a need to be cosseted by the concerns and beliefs that they professed to have for the past decade when they were members of the philosophical minority of this Court. Indeed, Chief Justice Kelly once exclaimed that a recent decision of the Court being reconsidered "has hardly had time to become outmoded."[10] Justice Cavanagh similarly protested that "[i]f a majority of the Court believes that reconsideration should be granted, then I believe that the *proper* course would be to receive briefs and hear arguments on

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[8] *Id*. at 21.

[9] The restraint demonstrated by this Court in *Peoples* has been duplicated by other courts denying rehearing when the sole basis is a change in the composition of the court. See *Golden Valley Co v Greengard's Estate*, 69 ND 171, 190; 284 NW 423 (1938); *Gas Products Co v Rankin*, 63 Mont 372; 207 P 993 (1922); *Wolbol v Steinhoff*, 25 Wyo 227, 258; 170 P 381 (1918); *Woodbury v Dorman*, 15 Minn 341 (1870); *Stearns v Hemmens*, 3 NYS 16 (NY Comm Pl, 1888).

[10] *McCready v Hoffius*, 459 Mich 1235, 1236 (1999) (Kelly, J., dissenting).

the defendant's constitutional argument before remanding the case to the trial court."[11]

Because nothing in the facts, arguments, or legal rationale has changed, I continue to support this Court's original decision and do not feel the need to restate it in its entirety here.

III. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of these consolidated appeals are simple, uncontested, and have been set out by this Court in detail three times.

The central question here is whether an insurance company that strikes a bad bargain with its insured may fob off on the Michigan Catastrophic Claims Association (MCCA), a nonprofit entity created by the Legislature to spread the costs associated with catastrophic automobile injuries, these "unreasonable" expenses. In our earlier decision, we held that the MCCA had explicit

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[11] *Id.* at 1236-1237 (CAVANAGH, J., dissenting) (emphasis added). Unlike this case, the defendants in *McCready* cited new authority for their position. Nevertheless, Chief Justice KELLY and Justice CAVANAGH were adamant that this Court erred by considering the new authority on rehearing. It is indeed *at least* curious that Chief Justice KELLY and Justice CAVANAGH opposed the remand order in *McCready*, which was premised on *new* authority, but freely joined this Court's order for rehearing "without further briefing or oral argument," *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 483 Mich 918 (2009), and the reversal of this Court's opinion without any new issues being raised.

Moreover, I find it odd that Justice HATHAWAY, who, during her Supreme Court campaign, actively promoted the fabrication that former Chief Justice TAYLOR slept through the oral argument of *McDowell v Detroit*, 477 Mich 1079 (2007), finds it appropriate to cast her vote to overturn this Court's decision without so much as attending argument on this case or allowing the party opposing the motion to have its day in court. See minutes 4:28 to 4:40 of the video at <http://www.youtube.com/watch?v=_7woWJDk1Qg> (accessed June 3, 2009).

statutory authority to resist assuming responsibility for an insurance company's *unreasonable* payouts.

Plaintiff United States Fidelity & Guaranty Company (USF&G) entered into a consent judgment with its insured, Daniel Migdal, which resulted in USF&G paying $54.84 an hour for attendant care services.[12] Plaintiff Hartford Insurance Company of the Midwest (Hartford) entered into a settlement agreement with its insured, Robert Allen, which required that Hartford pay $30 an hour for attendant care services. The MCCA refused to indemnify USF&G and Hartford beyond a rate of $22.05 and $20 respectively, rejecting the higher amounts as "unreasonable."

Plaintiffs brought these actions seeking declaratory judgments that the MCCA was required to reimburse the full rate of attendant care services that they paid their insureds. The circuit courts entered conflicting judgments and the aggrieved parties appealed. The

[12] The debate here is not whether an insurance company may refuse to fully compensate a catastrophically injured insured. Indeed, the plaintiff insurance companies were required to fully compensate their insureds under *USF&G I*. The question is whether an insurance company can agree to *overcompensate* its insured and escape this burden by having the rest of Michigan policyholders pay for that bad bargain. This very issue is well illustrated by the facts of *USF&G I* itself.

The rate that USF&G pays its insured, Daniel Migdal, to cover costs associated with his catastrophic injuries is so inflated that his father (Daniel's "caregiver") started a company, Medical Management, to make a profit from the arrangement. From the $54.84 hourly payments that USF&G makes, Medical Management pays the nurses (who actually provide Daniel's care) an average of $32 an hour (*including benefits!*) and retains the remainder of the USF&G hourly payment for itself. So inflated was the USF&G payment that, after paying for *all* of Daniel's care, Medical Management earned from this arrangement approximately $200,000 *in profits* for 2003. Under the majority's new opinion, it will be *Michigan policyholders*, not USF&G, who will pay for the profits of Daniel's father.

Court of Appeals consolidated the appeals and held that "the MCCA is statutorily required to reimburse an insurer for 100 percent of the amount that the insurer paid in PIP [personal protection insurance] benefits to an insured in excess of the statutory threshold listed in MCL 500.3104(2), regardless of the reasonableness of these payments."[13] The MCCA sought leave to appeal in this Court, which was granted, and this Court held that "when a member insurer's policy only provides coverage for 'reasonable charges,' the MCCA has authority to refuse to indemnify unreasonable charges."[14]

Because the composition of this Court changed on January 1, 2009, USF&G and Hartford sought rehearing[15] and the new majority granted this motion "without further briefing or oral argument."[16]

IV. DISCUSSION

As previously noted, at issue is whether the MCCA has the authority to refuse to indemnify member insurers for unreasonable payments they make to their policyholders. I agree with many points of the majority's new opinion, but the points of my disagreement are significant and the results of our differences will be extremely costly to the citizens of Michigan.

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[13] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 192; 731 NW2d 481 (2007).

[14] *USF&G I*, *supra* at 417.

[15] In its reply brief filed February 19, 2009, USF&G argued that "this Court's practice of granting rehearing requests based on nothing more than a view of a majority of the Justices that the Court's original opinion is incorrect . . . is as it should be, given this Court's status as a court of last resort." This statement both ignores *Peoples* and betrays plaintiffs' motivation for seeking rehearing.

[16] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 483 Mich 918 (2009).

I agree that "personal protection insurance benefits" are not the same as "personal protection insurance coverages."[17] I further agree that "the term 'coverage' is a broader term than 'benefits.' "[18] I particularly agree with each of the definitions for "coverages" cited by the new majority.[19] " '[C]overage' refers to protection afforded by an insurance *policy* or the sum of risks assumed by an insurance *policy*."[20] I disagree, however, with the new majority's refusal to interpret "coverages" consistent with the definitions that it cites—a reference to the underlying insurance policy.

The majority states its holding: "the indemnification obligation set forth in MCL 500.3104(2) does not incorporate the reasonableness standard that MCL 500.3107 requires between claimants and member insurers."[21] That is true but unresponsive to this Court's holding in

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[17] *Ante* at 14. Justice Weaver asserts that "the terms 'benefits' and 'coverages' are related because of their close proximity in the statute . . . ." *Ante* at 15. I am unfamiliar with this tenet of statutory construction, and Justice Weaver offers no authority for it. Indeed, whether separated by two words or two hundred, I believe that the meaning of "benefits" and "coverages" are related, but distinct.

[18] *Ante* at 15.

[19] *Ante* at 15, quoting *LeBlanc v State Farm Mut Auto Ins Co*, 410 Mich 173, 204; 301 NW2d 775 (1981), for the proposition that " '[c]overage', a word of precise meaning in the insurance industry, refers to protection afforded by an insurance policy, or the sum of the risks assumed by a policy of insurance." The new majority also cites the following consistent definitions: (1) the "[e]xtent of protection afforded by an insurance policy [or the] amount of funds reserved to meet liabilities"; (2) "protection against a risk or risks specified in an insurance policy"; (3) "the risks within the scope of an insurance policy"; and (4) the "amount, and extent of risk covered by insurer." *Ante* at 16, quoting *Webster's II New College Dictionary* (1995); *Random House Webster's College Dictionary* (2001); Black's Law Dictionary (7th ed); and Black's Law Dictionary (5th ed). See *USF&G I*, *supra* at 431 n 31.

[20] *USF&G I*, *supra* at 431 n 31 (emphasis added), quoting *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 217; 696 NW2d 621 (2005).

[21] *Ante* at 6; see also *ante* at 25.

USF&G I. This Court did not previously incorporate the § 3107 standard for personal protection insurance (PIP) benefits into § 3104(2). Rather, this Court, consistent with the definitions advanced by the majority, interpreted "coverages" as the "protection afforded by an insurance *policy*" and explained that "the member insurer's *policy* will ultimately control the standard for the MCCA's review because the *policy* establishes the 'personal protection insurance coverages.' "[22]

Referring to the consent judgment and settlement agreement at issue, the new majority contends that "[t]his contractual liability, *or coverage*, owed by each insurer is the total amount agreed to between the original contracting parties."[23] The fallacy in this assertion is that the consent judgment or settlement agreement is "coverage." As amply demonstrated by the definitions that the majority cites, "coverage" refers to the underlying *policy* purchased by the insured. That *policy* is the only relevant contract. The consent judgment and settlement agreement are separate contractual, albeit judicially sanctioned, agreements. They are distinctly *not* "the no-fault personal protection insur-

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[22] *USF&G I*, *supra* at 430-431; *id.* at 431 n 31 ("Thus, the terms of the *policy* control the standard for the MCCA's review."). This fundamental distinction was underscored by Justice MARKMAN in his concurrence:

> The dissent is correct that the reasonableness requirement of MCL 500.3107 is not integrated into the indemnification clause set forth in § 3104(2). [*USF&G I*, *supra*] at 457 [(WEAVER, J., dissenting)]. However, the majority opinion does not attempt to incorporate this requirement into the MCCA's statutory power to review a member insurer's claim to ensure it is in compliance with the policy. Rather, it holds that the MCCA can review a member's claim for compliance *with the policy*, which, as represented by both parties, generally includes a requirement that member insurers reimburse only *reasonable* claims based on § 3107. [*USF&G I*, *supra* at 434 n 1 (MARKMAN, J., concurring).]

[23] *Ante* at 16 (emphasis added).

ance coverages that are generally the subject of the act, i.e., those which were written in this state to provide the compulsory security requirements of § 3101(1) of the no-fault act for the 'owner or registrant of a motor vehicle required to be registered in this state' . . . ."[24] Because the majority offers no principled rationale for departing from the definitions that it cites or this Court's prior interpretation of "personal protection insurance coverages," I must respectfully dissent.

The majority makes additional erroneous assertions. First, the majority asserts that member insurers will have an incentive to make reasonable settlements of catastrophic claims because, if they do not, the MCCA premiums will increase.[25] The majority appears unaware of how incentives, or the MCCA, work. The premium that the MCCA charges to cover the liabilities it must statutorily assume is evenly distributed among the member insurers[26] and then passed on to those who

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[24] *In re Certified Question (Preferred Risk Mut Ins Co v Michigan Catastrophic Claims Ass'n)*, 433 Mich 710, 723; 449 NW2d 660 (1989). See also *USF&G I*, *supra* at 437-439 (Markman, J., concurring) (explaining that the consent judgment and settlement agreement are not part of the member insurer's "coverages" because "[a] member insurer that informs the MCCA that it will only pay 'reasonable' claims, but then subsequently modifies the policy after the accident occurs to include unreasonable claims, has essentially sought reimbursement for claims for which it has not paid premiums").

[25] *Ante* at 17 n 19.

[26] See MCL 500.3104(7)(d), which provides in pertinent part:

> Each member shall be charged an amount equal to that member's total written car years of insurance providing the security required by [MCL 500.3101(1)] or [MCL 500.3103(1)], or both, written in this state during the period to which the premium applies, multiplied by the average premium per car. The average premium per car shall be the total premium calculated divided by the total written car years of insurance providing the security required by section 3101(1) or 3103(1) written in this state of all members during the period to which the premium applies.

buy no-fault insurance.[27] Indeed, this Court has been informed that in *response to the order granting rehearing in this case*, the MCCA raised its rates by 19 percent per policy (or $693.8 million more for MCCA assessments in the aggregate for this year) to create the reserves necessary to pay the more expansive claims for unreasonable charges that the new majority's opinion permits. Contrary to the new majority's belief that an insurer will have an economic incentive to bargain for "reasonable" payments to its insureds, the majority opinion will have the perverse effect of eliminating an insurer's incentive to negotiate reasonable settlements. Indeed, instead of providing insurers a protective shield against unreasonable catastrophic claims, the majority opinion provides no-fault plaintiffs' attorneys a lethal sword against an insurer that insists on a reasonable settlement. MCL 500.3148(1) provides that a claimant's attorney fee is charged to the insurer "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." Under the majority's decision, an insurer has no reason to refuse any claim; thus, a claimant's attorney can use the threat of attorney fees to force an insurer into an unreasonable settlement.[28] Under the majority's decision, insurers will be encouraged to negotiate *un*reason-

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[27] See *USF&G I*, *supra* at 432 n 32; *In re Certified Question*, *supra* at 729 (explaining that the MCCA premiums are "inevitably" "passed on" to Michigan's no-fault insurance customers); MCL 500.3104(22) (which provides that "[p]remiums charged members by the association shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized").

[28] The MCCA provided a useful hypothetical conversation between a future plaintiff's no-fault attorney and an insurer:

> [Attorney]: I know that amount is a bit high for attendant care, but that is what we want. We'll sue to get it and we'll seek attorney fees and penalties too. [MCL 500.3148(1)] Do you want that?

able settlements and pass these off onto the MCCA. As stated, any liability that the MCCA must assume is eventually passed on to anyone in Michigan who must buy auto insurance.

Perhaps the majority can explain why the legislative method for containing costs for Michigan's no-fault insurance customers is an inferior purpose to their preferred policy objective. In particular, why is it an inferior purpose at a time when the Governor has requested an auto insurance rate freeze[29] and unemployment in Michigan has exceeded 14 percent?[30]

My point is not that our decision should be premised on keeping no-fault insurance affordable. Indeed, I maintain that such " '[p]olicy decisions are properly left for the people's elected representatives in the Legislature' "[31] and that the Legislature *has* made the policy decision in this case. Rather, I raise this issue because elections matter. The majority has seen fit to engage in its own policy-making while relying on erroneous assumptions. This is a lethal combination that will result in harmful, unintended consequences. While it may be

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> Insurer: Of course not, but that amount is unreasonable.
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> [Attorney]: What does reasonable have to do with it? [The] MCCA has to pay you regardless. Do you want to incur three times that amount in attorney fees instead?
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> Insurer: Of course not.

[29] See Executive Directive No. 2009-1.

[30] See Louis Aguilar, *Michigan's jobless rate 14.1%, highest since '83*, Detroit News, June 18, 2009; Heather Lockwood, *State jobless rate of 14.1% is highest—since July '83*, Lansing State Journal, June 18, 2009, available at <http://www.lansingstatejournal.com/atricle/20090618/NEWS01/906180327> (accessed June 28, 2009).

[31] *USF&G I*, *supra* at 432 n 32, quoting *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005).

politically expedient to position oneself as "looking out for the little guy,"[32] this case is an excellent example of how acting on such an altruistic impulse rather than applying the law results in a negative consequence for the vast majority of our citizens. In this context, each of us who must purchase this mandatory no-fault coverage is a "little guy."[33]

Second, the majority emphasizes that the MCCA may *only* adjust a member insurer's "practices and procedures."[34] The majority then immediately (and inconsistently but accurately) concedes that MCL 500.3104(7)(g) permits the MCCA to "adjust or assist in the adjustment of claims" and "[w]hen the MCCA asserts its power to adjust or assist in the adjustment of a claim, the MCCA effectively steps into the shoes of the

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[32] See, e.g., Todd C. Berg, *Hathaway attacks, but sketchy on incumbent's record*, Michigan Lawyers Weekly, October 7, 2008, p 14 ("The centerpiece of Hathaway's campaign against Taylor has been her claim that he rules against middle-class families and in favor of 'big insurance companies and corporate special interests.' "); Todd C. Berg, *Hathaway's campaign pledge may support MSC office closure*, Michigan Lawyers Weekly, December 15, 2008, p 1 ("Justice-elect Diane M. Hathaway ran for the Michigan Supreme Court on the platform that she would stand up for middle-class families and oppose the lavish perks and benefits that Supreme Court justices were bestowing on themselves.").

[33] The exception, of course, is the lawyer who makes a living doing no-fault insurance work. For such practitioners, the majority's opinion creates a new submarket of opportunity. See note 28 of this opinion.

[34] *Ante* at 21-22. See MCL 500.3104(7)(g), which provides that the MCCA shall

> [e]stablish procedures for reviewing claims procedures and practices of members of the association. If the claims procedures or practices of a member are considered inadequate to properly service the liabilities of the association, the association may undertake or may contract with another person, including another member, to adjust or assist in the adjustment of claims for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member.

member insurer."[35] I previously agreed with these propositions.[36] Thus, I struggle to comprehend for what purpose the majority resists the simple proposition that the MCCA is statutorily authorized to adjust claims.

Third, "[p]laintiffs argue[d] that if the MCCA may reject member insurer claims on the basis of the reasonableness of the charges, member insurers will need to seek assurances that the MCCA will reimburse certain payments before making them, thus delaying payment."[37] The prospect of delayed payment seems to be a primary concern that drives the new majority's analysis. In support of its construction, it contends:

> If this Court were to accept the MCCA's argument, the logical consequence would be that member insurers would be reluctant to settle with the claimant. Member insurers might then force a jury trial with every catastrophically injured claimant in order to secure a verdict with a "reasonable" stamp on the result.[38]

The majority employs this policy-based rationale to depart from its own definitions of "coverages" because otherwise "[t]his outcome goes against the legislative purpose of ensuring efficient and quick recovery for claimants in the no-fault system."[39] The majority fails to explain, however, how its alternative construction actually resolves the issue. In fact, it does not.

The majority concedes that the MCCA *has authority to* "*requir*[*e*] submission of proposed settlement agree-

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[35] *Ante* at 22 n 24.

[36] *USF&G I*, *supra* at 430 n 30.

[37] *Id*. at 432 n 32.

[38] *Ante* at 19.

[39] *Ante* at 19.

ments for approval . . . ."[40] This is the very outcome that the plaintiff insurance companies here sought to avoid. Indeed, I believe that "requiring submission of proposed settlement agreements" or "seeking assurances that the MCCA will reimburse certain payments" would have been a natural consequence of *USF&G I*, because it actually gave meaning to the plain language of this statute. The MCCA is likely to act on the majority's advice (indeed, it *should*) and mandate that member insurers afford it the opportunity to object to proposed settlements or other agreements *before* they become binding. Ironically, it appears that even the majority does not deny that the MCCA has this statutory power.

Thus, the issue of delay is not resolved by the majority's opinion. Moreover, the majority's opinion does not address circumstances, like the present cases, where the MCCA was *not* afforded an opportunity to reject the agreements, which likely explains the $693.8 million bill that will be passed onto and shared by every Michigan automobile owner because of the increased and uncontrolled liability that the new majority's opinion will create for the MCCA.

We, as jurists, are ill-prepared to make complicated policy-based judgments unrelated to the policy choices that the Legislature has enacted. We do the least damage when we merely follow the Legislature's lead by giving the words of a statute a plain reading and enforc-

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[40] *Ante* at 22. The majority acknowledges this authority within the context of reading MCL 500.3104(7)(g) in conjunction with § 3104(7)(b), which provides that the MCCA shall

> [e]stablish procedures by which members shall promptly report to the association each claim that, on the basis of the injuries or damages sustained, may reasonably be anticipated to involve the association if the member is ultimately held legally liable for the injuries or damages. Solely for the purpose of reporting claims, the member shall in all instances consider itself legally liable for the injuries or damages. *The member shall also advise the association of subsequent developments likely to materially affect the interest of the association in the claim*. [Emphasis added.]

ing the statute as written. "The Legislature, unlike the judiciary, is institutionally equipped to assess the numerous trade-offs associated with a particular policy choice."[41] The Legislature has made difficult choices, and it used particular words with particular meanings to convey those choices. Our prior opinion respected our role as jurists, and the Legislature's role as policy-maker, by interpreting the relevant statutory language in a manner consistent with the plain meaning of the words chosen by the Legislature. In an effort to avoid the meaning of the words chosen by the Legislature, the new majority has engaged in a wandering, policy-based analysis that is as flawed as it is misguided. It is an expensive mistake for which every policyholder in Michigan will pay.

Undeterred and aiming to quell the likely negative response to its policy-based decision, the new majority asserts that my concerns "appear[] highly speculative and, indeed, unfounded."[42] My concerns will cease to be "highly speculative" and "unfounded" when they are reflected in the MCCA's annual assessments. Michigan drivers will soon receive their no-fault insurance bills (I have received mine) with the updated higher MCCA assessment for the fiscal year beginning July 1, 2009. At that point, Michigan drivers will be free to determine for themselves whether my concerns are sound and based in reality.

Accordingly, I respectfully dissent.

Corrigan, J., concurred with Young, J.

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[41] *Devillers*, *supra* at 589. Indeed, the new majority's response to my dissent underscores this point. The new majority asserts that "there is no evidence that defendant has routinely or even occasionally challenged the reasonableness of insurers' settlements" and "it is unknown whether the actuarial assessment factored in the effect of defendant's potential use of [MCL 500.3104(7)(g)]." *Ante* at 24. The Legislature, unlike this Court, has the means to obtain the answers to those questions.

[42] *Ante* at 23.

APPENDIX

STATE OF MICHIGAN

IN THE SUPREME COURT

UNITED STATES FIDELITY INSURANCE & GUARANTY COMPANY, a foreign corporation,	Case No. 133466
Plaintiff-Appellee,	Court of Appeals Case No. 260604
vs.	Oakland Circuit Court No. 03-051485-CK
MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, a non-profit Catastrophic Claims Association,	
Defendant-Appellant.	

AFFIDAVIT OF GLORIA FREELAND IN SUPPORT OF APPELLANT'S SUPPLEMENT TO ITS ANSWER TO APPELLEE'S MOTION FOR REHEARING

I, Gloria Freeland, being first duly sworn, depose and swear:

1. I am the Executive Director of the Michigan Catastrophic Claims Association (the "MCCA"). I have held this position since 2007 and have been employed by the MCCA since 1991.

2. I have personal knowledge of the facts in the Affidavit, and if called upon to testify, I can do so competently.

3. Each year the MCCA's consulting actuaries estimate the loss and loss adjustment reserve expenses of the MCCA.

4. This year, as a direct result of the Michigan Supreme Court's March 27, 2009 order granting the appellees' motion for rehearing, the MCCA's actuaries recommended, and the Board of Directors accepted their recommendation, that the MCCA increase by 10% the estimated $645 million needed to pay claims expected to be incurred for the fiscal accident year beginning July 1, 2009. This represents an increase of $64.5 million.

5. Further, the actuaries recommended, and the Board of Directors accepted their recommendation, that the MCCA increase its needed reserves as of December 31, 2008 by 5% or $629.3 million as a direct result of the signal sent by the Michigan Supreme Court in granting appellees' motion for rehearing.

6. Increasing by $64.5 million the amount needed to pay claims expected to be incurred for the fiscal accident year beginning July 1, 2009, and increasing the MCCA's needed reserves by $629.3 million, are largely responsible for the increase of more than 19% in this year's assessment.

Gloria Freeland

Dated: April 8, 2009

Subscribed and sworn to before me
this 8th day of April, 2009
Notary Public
My Commission Expires:

KAREN M. NICK
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Jan 1, 2014
ACTING IN COUNTY OF Wayne

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MARKMAN, J. (*dissenting*). I concur fully with the discussion in part IV of Justice YOUNG's dissenting opinion and therefore also dissent.

Motion for Recusal Denied July 21, 2009:

UNITED STATES FIDELITY & GUARANTY COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 133466, and HARTFORD INSURANCE COMPANY OF THE MIDWEST v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 133468.

On order of the Court, the motion for recusal is considered, and it is denied.

HATHAWAY, J. On March 27, 2009, this Court issued an order granting rehearing in this matter.[1] Since that time, defendant Michigan Catastrophic Claims Association (MCCA) has filed a motion asking me to recuse myself. The nature of the objection is well described in the parties' briefs and responses thereto.[2] I have reviewed these pleadings in detail.

I have also had an opportunity to review *Caperton v A T Massey Coal Co, Inc*, 556 US __ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), and the briefs filed by the parties regarding this new decision. In reviewing whether there was a due process violation in the refusal of Justice Benjamin[3] to disqualify himself, the United States Supreme Court held as follows:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the

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[1] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 483 Mich 918 (2009).

[2] The motion and related documents, including all the briefs of the parties and the amici curiae, may be viewed at <http://courts.michigan.gov/supremecourt/Clerk/10-08/133466-133468/133466-133468-Index.htm>.

[3] Justice Benjamin sits on the West Virginia Supreme Court of Appeals and had received in excess of $3 million in financial support to his campaign from the individual who was chairman, chief executive officer, and president of the defendant in the case before him.

> case by raising funds or directing the judge's election campaign when the case was pending or imminent . . . .
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> * * *
>
> Our decision today addresses an *extraordinary* situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. *The facts now before us are extreme by any measure.* The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case. [*Id*., slip op at 14, 16-17 (emphasis added).]

Given this test, I find no arguable due process violation in the cases before me. There is nothing alleged by the MCCA that would cause any reasonable person to believe that there is a significant and disproportionate influence being asserted upon me under any objective analysis.

Despite the theories proffered by the MCCA, my husband has no connection to or financial interest in this matter. He is not an attorney for or employee of any party, nor is he a litigant in either of these cases. He has no relationship with either the attorneys or the litigants in these cases. The MCCA asserts that, because my spouse has handled cases in the field of no-fault insurance law, I must recuse myself. However, this assertion suggests a basis for recusal that is so attenuated from the facts of these cases that it strains reasoned logic.

This is not to say that parties should be impeded from bringing such motions. However, not every hypothetical theory proffered by a litigant must be accepted as accurate or controlling. The issue to be decided is one of due process. Any alleged due process claim must be evaluated

by an objective standard. Due process does not require that a justice recuse himself or herself merely because the justice's spouse or child is an attorney practicing in the field of law that is involved in the disputed case, just as due process would not require a justice's recusal in all medical malpractice cases merely because the justice's spouse is a physician or require a justice's recusal in all cases involving school systems merely because the justice's spouse is a teacher.

In conclusion, I have no personal bias or prejudice for or against any party in this matter. Moreover, neither I nor any member of my immediate family has any real or arguable financial interest in this case. The allegations made by the MCCA are not a basis for recusal because there is no appearance of impropriety and no due process violation. Accordingly, there is no reason to recuse myself.[4] Having carefully considered this motion for recusal, I deny it.[5]

Kelly, C.J., and Cavanagh, J. We concur with the statement of Justice Hathaway.

Weaver, J. I agree with Justice Hathaway's denial of the recusal motion because due process is not violated in this case.

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[4] Currently, there are no rules governing the recusal of justices. On March 18, 2009, a majority of this Court voted to publish for comment various proposals for rules that would govern the recusal of justices. 483 Mich 1205 (2009). Until such time as comprehensive rules governing the recusal of justices in Michigan are adopted, I will follow this Court's current practice whereby the justice from whom recusal is sought decides the motion for recusal. Michigan's current recusal practice is the same as that of the United States Supreme Court, and there is no indication in *Caperton* that this practice violates due process.

[5] While I do not acquiesce to the statements of Justices Corrigan, Markman, and Young, I will not participate in this Court's practice of engaging in responses to comments of others that are inappropriate and unnecessary. This Court should discontinue devoting the state's limited resources to unproductive colloquy.

I take this opportunity to provide some history on the issue of disqualification in this Court. Since 2003, I have raised the issue of the need for clear, written, and fair disqualification rules for Michigan Supreme Court justices,[1] but the "majority of four" (former Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) refused to address the issue. When this Court looked at the issue of disqualification in 2006, the "majority of four" refused to publish proposed disqualification rules formulated by members of this Court.

In March of this year, after former Chief Justice TAYLOR's removal from this Court as a result of his overwhelming defeat in the 2008 election, the "remaining three" (Justices CORRIGAN, YOUNG, and MARKMAN) voted against publishing proposed rules for disqualification. Fortunately, a majority voted in March to publish, for public comment until August 1, 2009,

[1] See, e.g., the statements or opinions by WEAVER, J., in *In re JK*, 468 Mich 202, 219 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080, 1081 (2006); *Lewis v St John Hosp*, 474 Mich 1089 (2006); *Adair v Michigan*, 474 Mich 1027, 1044 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 328 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006); *People v Parsons*, 728 NW2d 62 (2007); *Ruiz v Clara's Parlor, Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049 (2007); *State Automobile Mut Ins Co v Fieger*, 477 Mich 1068, 1070 (2007); *Ansari v Gold*, 477 Mich 1076, 1077 (2007); *Short v Antonini*, 729 NW2d 218, 219 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222, 223 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099 (2007); *Tate v City of Dearborn*, 477 Mich 1101, 1102 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869 (2007); *Cooper v Auto Club Ins Ass'n*, 739 NW2d 631 (2007); and *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008).

Also see my personally funded website, www.justiceweaver.com.

three proposals for rules of disqualification[2] to be considered at a public hearing later in 2009. Of the proposals published by this Court in March, I note that Alternative C sufficiently provides the due process protections laid out by the United States Supreme Court in the recent decision of *Caperton v A T Massey Coal Co, Inc*, 556 US ___ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

I also note that the United States Supreme Court's *Caperton*[3] discussion of disqualification with regard to campaign contributions for justice elections raises further issues with regard to due process concerns. Currently, this Court has no rules providing for a justice's disclosure of campaign contributions when parties to cases, or the parties' immediate family members, contribute significant amounts of money, directly or indirectly, to a justice's campaign.[4] Hopefully this Court, the Legislature, and/or the public will create disclosure rules that will ensure the protection of due process rights.

Corrigan, J. I would not resolve the recusal motion of defendant Michigan Catastrophic Claims Association (MCCA) at this time. Rather, I would order supplemental briefing of the application of *Caperton v A T Massey Coal Co, Inc*, 556 US ___ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (*Caperton*), to these cases. *Caperton* addressed the disqualification of a judge when a party alleges that the judge's interest in a case requires recusal under the Due Process Clause of the federal

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[2] These three proposals are the same proposals that the "majority of four" refused to publish in 2006.

[3] Justices Corrigan and Young and former Chief Justice Taylor filed an amicus curiae brief in the *Caperton* case in opposition to the plaintiff Caperton's ultimately successful appeal.

[4] Beyond due process issues involving campaign contributions, I further note that this Court does not have rules ensuring due process by requiring disclosure by justices of their former representation as attorneys of parties appearing before the Court, regardless of how far in the past the representation may have been.

constitution. To weigh whether recusal is required, *Caperton* requires an assessment of whether a serious, objective risk of actual bias exists that requires the judge to recuse himself or herself. Because the MCCA argues that Justice HATHAWAY's participation in these cases violates its federal due process rights, *Caperton* is relevant and could prove controlling. Indeed, the MCCA has submitted *Caperton* to this Court as supplemental authority in support of its motion.

The scope of *Caperton* and how courts will implement it present significant unanswered questions, particularly for our Court. *Caperton* held that a state supreme court justice was disqualified from hearing a case involving a corporate party whose chairman and CEO had expended $3 million to support the justice's campaign, although the individual expended this money independently and through donations to an independent political group. *Caperton*, 129 S Ct at 2257. The Court concluded that the justice was disqualified although he professed that the funds were solicited and expended without his knowledge, direction, or control under state election laws very similar to our own. See *Caperton v A T Massey Coal Co, Inc*, 223 W Va 624, 703-705; 679 SE2d 223 (2008) (*W Va Caperton*) (Benjamin, acting C.J., concurring). Indeed, Michigan allows independent political groups to expend unlimited money during elections, often without being required even to reveal their funding sources.[1] For example, during the 2008 election cycle, independent

[1] The Michigan Campaign Finance Act, MCL 169.201 *et seq.*, does not regulate certain expenditures, including those "for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference." MCL 169.206(2)(b). See also *Right to Life of Michigan, Inc v Miller*, 23 F Supp 2d 766, 767 (WD Mich, 1998), quoting *Buckley v Valeo*, 424 US 1, 44 & n 52 (1976) (observing that Michigan is prohibited from

expenditures aimed at the race for Justice Hathaway's current seat on this Court topped $3.75 million.[2]

For these reasons, in my view, deciding the MCCA's recusal motion within days of *Caperton* is precipitous. *Caperton* was released on June 8, 2009. We have hardly had time to digest the opinion, much less its ramifications, particularly given that the opinion is positively Delphic in explaining the standards for courts attempting to implement it. Four justices of this Court now vote, without any explanation or the benefit of fact-finding, to support Justice Hathaway's decision to participate in these cases. Thus, although we have had little time to study *Caperton* and do not have the benefit

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regulating speech protected by the "express advocacy" test established in *Buckley*, which permits regulation only of "communications that 'in express terms advocate the election or defeat of a clearly identified candidate,' " such as those employing " 'express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject" ' "); *Planned Parenthood Affiliates of Michigan, Inc v Miller*, 21 F Supp 2d 740, 745 (ED Mich, 1998) (noting that Michigan is prohibited under *Buckley* from regulating "issue advocacy"). Therefore, in practice, many major expenditures, including those for television ads, are not covered by our reporting laws. See Michigan Campaign Finance Network, 2008 Citizen's Guide to Michigan Campaign Finance, p 14 <http://www.mcfn.org/pdfs/reports/MCFNCitGuide08.pdf> (accessed June 18, 2009) (hereinafter "MCFN Citizen's Guide") ("[A]dvertisements that define[] the character and qualifications of the candidates without explicitly exhorting a vote for or against either candidate" are "not considered to be campaign expenditures and the sources of money that paid for the ads are not required to be disclosed."). Accordingly, although a major expenditure may ultimately benefit a candidate, the expenditure—and its funding sources—may be outside the candidate's awareness and control. Further, even regulated "independent expenditures" by third parties, which must be reported if they support a candidate, *must* be made without the direction or control of the candidate. MCL 169.209(2); MCL 169.251.

[2] MCFN Citizen's Guide, p 14; see also Michigan Campaign Finance Network, *Anonymous donors dominated Supreme Court campaign*, November 19, 2008 <http://www.mcfn.org/press.php?prId=77> (accessed June 18, 2009) ("More than 60 percent of spending for the Michigan Supreme Court campaign between incumbent Chief Justice Clifford Taylor and Judge Diane Marie Hathaway will not be disclosed in any campaign finance report because it paid for candidate-focused 'issue' advertising.").

of briefing on it, the Court proceeds essentially to hold that such a vote is a mandatory procedure for all recusal motions raising due process concerns.[3]

THE MCCA'S MOTION FOR RECUSAL

The most relevant aspects of the MCCA's motion follow. After this Court issued its March 2009 decision to grant reconsideration[4] of its December 2008 decision,[5] occasioned by newly elected Justice HATHAWAY's partici-

[3] This occurs although *Caperton* has sparked much debate concerning its application. For example, *Michigan Lawyers Weekly* quoted former Michigan State Supreme Court Chief Justice CLIFFORD TAYLOR as stating that *Caperton* " 'has to mean that the challenged justice can't make the recusal decision alone.' " *MSC recusal rule may not be constitutional*, Michigan Lawyers Weekly, June 15, 2009, p 23. Chief Justice KELLY also asserted, in a recent press release, that *Caperton* " 'signals that we do need to have appropriate protections in place' " and "will assist the Michigan Supreme Court as it develops its own disqualification rules for justices." Michigan Supreme Court, Office of Public Information, Caperton *ruling by U.S. Supreme Court highlights importance of fair and impartial justice, says Michigan Supreme Court Chief Justice Marilyn Kelly*, June 9, 2009 <http://courts.michigan.gov/supremecourt/Press/060909-CapertonDQ.pdf> (accessed June 18, 2009). Wayne County Assistant Prosecuting Attorney Timothy Baughman, on the other hand, "[r]espectfully" but "heartily" disagreed with former Chief Justice TAYLOR's comments, asserting in a *Michigan Lawyers Weekly* Viewpoint comment:

> *Caperton* is a case about standards and not about the identity of the decision-maker. . . .
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> * * *
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> Nothing in *Caperton* requires that the decision on a recusal motion be reviewed by another justice or body of justices. For the Michigan Supreme Court [to continue] to follow the practice of the U.S. Supreme Court is perfectly permissible, so long as a system of "objective rules" exists. [*'Caperton' was about recusal standards, not decision maker*, Michigan Lawyers Weekly, June 22, 2009, p 7.]

[4] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 483 Mich 918 (2009).

[5] *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 482 Mich 414 (2008).

pation in these cases, the MCCA moved for her recusal. Specifically, the MCCA argues that Justice Hathaway's husband, Michael Kingsley, has an interest that could be substantially affected by the outcome of the proceedings because he is a practicing plaintiffs' no-fault attorney in Michigan. As such, he has a direct interest that is more than *de minimis* in the MCCA's unlimited obligations to reimburse insurers for personal protection insurance benefits paid to insureds who have been catastrophically injured in automobile accidents.[6] The MCCA further asserts that it reimburses insurers for payments made to Kingsley's clients, having made such

[6] The MCCA has an unlimited statutory obligation to reimburse insurers for 100 percent of claims paid to insureds whose losses due to personal injury exceed certain statutory caps; the current cap is $460,000. MCL 500.3104(2)(i) and (7)(a). As is further explained by Justice Young, *post* at 62, the MCCA asserts that reversal of this Court's prior opinion on rehearing will require the MCCA to reimburse all benefits paid by insurers to their catastrophically injured insureds, without regard to the reasonableness of the insured's underlying expenditures. Accordingly, the MCCA states that its insurer members will have little incentive to defend unreasonable claims by their insureds; no matter how unreasonable the expenditure—at issue in one of these cases, for example, are an insured's expenditures of $54.84 an hour for attendant care services—if the insurer accepts its insured's claim, the MCCA will be obligated to reimburse the insurer in full. The MCCA asserts: "With a guarantee of MCCA reimbursement, coupled with the lure of saving legal defense costs, members will have a strong motive to settle [personal protection insurance] claims early and with little or no resistance." It concludes: "This directly benefits lawyers like Mr. Kingsley who represent plaintiffs in no-fault automobile insurance cases, and who typically receive their fees out of the proceeds of settlements." To illustrate, the MCCA has provided a hypothetical conversation between a future plaintiff's attorney and an insurer:

> [Attorney]: "I know that amount is a bit high for attendant care, but that is what we want. We'll sue to get it and we'll seek attorney fees and penalties too. [See MCL 500.3148(1).] Do you want that?"
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> Insurer: "Of course not, but that amount is unreasonable."
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> [Attorney]: "What does reasonable have to do with it? [The] MCCA has to pay you regardless. Do you want to incur three times that amount in attorney fees instead?"

a reimbursement as recently as April 9, 2009.[7] The MCCA's obligation to reimburse insurers—and the potential resulting benefits to plaintiffs' attorneys—is directly at issue in these cases. Indeed, the MCCA asserts that it has raised the amounts needed to pay expected claims and its reserves by almost $694 million in anticipation of this Court's likely reversal on rehearing of its prior decision, stemming from the participation of newly elected Justice HATHAWAY in the decision after rehearing. The MCCA further states that this increase is the primary cause of the 19 percent increase in its assessments for catastrophic coverage this year, which affects all no-fault insurance policy holders' rates. The MCCA claims that if, on rehearing, this Court prohibits the MCCA from engaging in a "reasonableness" inquiry, see n 6 of this statement, attorneys will reap the rewards at the expense of Michigan drivers, whose insurance rates will rise to support the resulting increased systemic costs.[8]

Insurer: "Of course not."

[7] MCR 2.003(B)(5) provides in part that a judge is disqualified from hearing a case if "the judge's spouse . . . has an economic interest in the subject matter in controversy . . . or has any other more than de minimis interest that could be substantially affected by the proceeding." MCR 2.003(B)(6)(c) also provides that a judge is disqualified if the "judge or the judge's spouse . . . is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding[.]" Similarly, the United States Supreme Court requires recusal with regard to a justice's spouse if " 'the amount of the relative's compensation could be substantially affected by the outcome' . . . ." See *Adair v Michigan*, 474 Mich 1027, 1031 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.), quoting the United States Supreme Court's Statement of Recusal Policy, November 1, 1993.

[8] No-fault automobile negligence cases remain a dominant factor in Michigan civil filings every year. Of the 46,216 new civil filings in Michigan circuit courts in 2008, 8,477—or more than one-fifth of all civil cases—were automobile related. See 2008 Annual Report of the Michigan Supreme Court, p 30 <http://www.courts.michigan.gov/scao/resources/publications/statistics/2008/2008execsum.pdf> (accessed June 18, 2009). Further, because many, if not most, no-fault claims settle out of court, the number of claims potentially affected by this Court's ruling is much higher than the number of cases filed.

THE *CAPERTON* DECISION

In *Caperton*, the United States Supreme Court "underscore[d] the need for objective rules" and asserted that the Due Process Clause requires recusal motions to be decided "by objective standards that do not require proof of actual bias." *Caperton*, 129 S Ct at 2263. In concluding that recently elected West Virginia Supreme Court of Appeals Justice Brent Benjamin was disqualified from hearing the underlying case as a result of substantial campaign expenditures by the chairman, CEO, and president of the respondent company, A. T. Massey Coal Co., Inc., the Court held that "[d]ue process requires an objective inquiry" to establish whether the circumstances " 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' " *Id.* at 2264, quoting *Tumey v Ohio*, 273 US 510, 532 (1927). Significantly, the Court thus considered the purported facts underlying the motion for recusal, see *Caperton*, 129 S Ct at 2264,[9] and concluded, on the basis of its assessment of those facts, that "there was . . . a serious, objective risk of actual bias," *id.* at 2265.

QUESTIONS RAISED BY *CAPERTON*

In light of the *Caperton* opinion, I do not think that we can resolve the MCCA's recusal motion—which squarely raises due process concerns—without first addressing the following questions:

• Does this Court's historical recusal practice—which permits each justice to decide motions for his or her recusal and which Justice Hathaway follows here—comport with the *Caperton* Court's requirement for objective standards? Justice Hathaway states: "[N]either I nor any member of my immediate family has any

[9] Somewhat confusingly, the Court considered the purported facts underlying the recusal motion, but also conceded that there was "no procedure for judicial factfinding . . . ." *Caperton*, 129 S Ct at 2264.

real or arguable financial interest in this case. The allegations made by the MCCA are not a basis for recusal because there is no appearance of impropriety and no due process violation." *Ante* at 47. She adds: "Given [the *Caperton*] test, I find no arguable due process violation in the cases before me. There is nothing alleged by the MCCA that would cause any reasonable person to believe that there is a significant and disproportionate influence being asserted upon me under any objective analysis." *Ante* at 46. But the challenged justice in *Caperton* issued similar statements in which he declined to recuse himself, explaining that the moving party had provided no objective evidence of actual bias and expressing his subjective opinion that none of his motives were improper. *Caperton*, 129 S Ct at 2262-2263. Indeed, West Virginia's recusal rules are strikingly similar to the practice followed by this Court. See *W Va Caperton*, *supra* at 702. Like Justice HATHAWAY—albeit while providing extensive factual detail concerning the allegations against him and legal precedent on the subject of recusal—Justice Benjamin asserted: "I have no pecuniary interest in the outcome of this matter. . . . I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein." *Id.* at 697. He added: "[N]o improper act or conduct, and no appearance of an improper act or conduct with respect to this case, or any other case, has occurred on my part[.]" *Id.* at 701. "Simply put, I do not have, nor was there any evidence to show that I had a 'direct, personal, substantial, pecuniary interest' in this case." *Id.* at 702. Yet the United States Supreme Court concluded that his subjective assertions that he lacked actual bias were insufficient for constitutional purposes. *Caperton*, 129 S Ct at 2263. Particularly in light of the similarities between Michigan's and West Virginia's recusal

practices—indeed, in both states recusal decisions have been left to the discretion of the individual justice whose recusal is sought, *W Va Caperton*, *supra* at 702—I simply cannot conclude without further study that the historic practice followed by Justice HATHAWAY today complies with *Caperton*. Nor can I conclude that Justice HATHAWAY may conclusively disavow any similarity to the facts of *Caperton* by simply offering her own opinion that "[t]here is nothing alleged by the MCCA that would cause any reasonable person to believe that there is a significant and disproportionate influence being asserted upon me under any objective analysis." *Ante* at 46.

• Is it sufficient under *Caperton* that four justices of this Court have voted to support Justice HATHAWAY's decision here? Although *Caperton* expressly failed to address a proper method for fact-finding, the Court reached its decision by carefully considering the facts surrounding Justice Benjamin's election. Here the MCCA alleges that Justice HATHAWAY must recuse herself because her husband has more than a *de minimis* financial interest in the subject matter of these cases. The MCCA points to very recent payments it has just made to one of Mr. Kingsley's clients. It also alleges that it has raised the amounts needed to pay expected claims and its reserves by $693.8 million in anticipation of this Court's potential reversal on rehearing of its earlier ruling in these cases; it states that the rate hike will be necessary because, if we reverse, claimants such as Mr. Kingsley's clients will receive substantially higher payments—*which result in higher attorney contingency fees*—because insurers will have no legal basis for resisting unreasonable settlement demands made by plaintiffs' attorneys. Can we possibly decide whether these alleged facts establish that " 'the probability of actual bias on the part of [Justice HATHAWAY] is too high to be constitutionally tolerable' " without first engaging in some kind of independent inquiry to test the claim

and Justice HATHAWAY's summary denial of it?[10] See *Caperton*, 129 S Ct at 2257, quoting *Withrow v Larkin*, 421 US 35, 47 (1975).

I raise these concerns in part in light of the dissent filed by Chief Justice Roberts in *Caperton*. He asks, among

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[10] As former Chief Justice TAYLOR suggested to *Michigan Lawyers Weekly*: " 'You can't set up the kind of test the U.S. Supreme Court created in *Caperton* without giving parties the opportunity to have a hearing . . . . Where else or how else will they be able to adduce the facts needed to meet the new objective test?' " *MSC recusal rule may not be constitutional*, Michigan Lawyers Weekly, June 15, 2009, p 23.

Moreover, as Justice YOUNG intimates, the narrow *Caperton* holding—that, under some circumstances, an elected judge is disqualified from hearing a case on the basis of contributions to his or her campaign—is also directly implicated in this case and will continue to be regularly implicated in cases before this Court given the current state of Michigan election law. As it bears on this case, at her January 8, 2009, investiture ceremony, Justice HATHAWAY attributed her election to various organizations that supported her campaign. Investiture Ceremony for the Honorable DIANE M. HATHAWAY, 483 Mich cliii, clxviii (2009). Of particular note is her acknowledgment of the Michigan Association for Justice (MAJ); the MAJ has explicitly supported the defendants in these cases and filed an amicus curiae brief in support of the motion for rehearing. Organizations that supported Justice HATHAWAY's campaign, including the AFL-CIO, whose president, Mark Gaffney, acted as master of ceremonies at the investiture proceeding, are also members of the Coalition Protecting Auto No-Fault, which filed an amicus curiae brief in these cases opposing Justice HATHAWAY's recusal. Further, these cases involve insurance companies as parties. During her campaign, Justice HATHAWAY regularly spoke out against insurance companies and suggested that she would not " 'sid[e] with big insurance companies' " if she were elected to this Court. *Hathaway sworn in as MSC's 104th justice*, Michigan Lawyers Weekly, January 12, 2009, p 2. Upon her investiture as a justice of this Court, she told the *Detroit News*: " 'For at least 10 years, the Michigan Supreme Court has been in favor of insurance companies . . . . [Now] I think we will see a lot more real justice out of this Supreme Court.' " *Michigan Supreme Court to swear in newest justice*, Detroit News, January 8, 2009. Under an objective *Caperton* inquiry, it seems inescapable that such comments must be analyzed to establish whether the circumstances " 'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true,' " *Caperton*, 129 S Ct at 2264, quoting *Tumey*, *supra at 532*, or suggest "a serious, objective risk of actual bias," *Caperton*, 129 S Ct at 2265.

40 questions, whether—although a justice does not have an actual financial interest in the case—a litigant may challenge the justice's refusal to recuse himself or herself in federal district court under 42 USC 1983,[11]

Finally, I note the significant fact that *Caperton* provides no guidance concerning how to evaluate the effect of *anonymous* campaign expenditures, which are common in Michigan, as I discuss in n 1 of this statement. Indeed, anonymous and independent expenditures during the 2008 election season included $1.4 million garnered by the Democratic Party from undisclosed donors to underwrite a TV ad campaign impugning Justice Hathaway's opponent, former Chief Justice Taylor. *In Michigan courts, it's the public that's blindfolded*, Detroit Free Press, June 14, 2009. At this time, it is totally unclear how a court attempting to comply with *Caperton* would take such donations into account. As Justice Benjamin presaged in his *W Va Caperton* concurrence,

> every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office. This now includes those who contribute to or support so-called Independent Expenditure Groups who engage in political campaigns completely independent of candidates of office.
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> * * *
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> If the Appellees' argument became the law, every judicial officer in this state would be disqualified from any and every case in which an independent nonparty organization over which the judicial officer had no control received contributions from individuals or groups which included a person or entity affiliated with a party or an attorney in the case, when the independent nonparty organization used its contributions to wage a campaign against the judicial officer's electoral opponent. Conversely, such a standard would likely require a judge also to recuse himself or herself when an independent expenditure group operated against the judge or supported the judge's opponent. Our judicial system would break down under such a standard for disqualification. [*W Va Caperton*, *supra* at 699, 703-704.]

Clearly, without the benefit of further study and a process for objective fact-finding, this Court is ill-equipped to properly resolve the complex questions presented by *Caperton*.

[11] The summary nature of the majority's treatment of this disqualification motion indeed may lead the MCCA to test its due process claim in federal court under 42 USC 1983 rather than in this Court. This is yet another reason why we should allow the parties to brief the *Caperton* due process question.

which permits a person deprived of a federal right by a state official to sue for damages. *Caperton*, 129 S Ct at 2271 (Roberts, C.J., dissenting). He also reasonably asks whether the parties are "entitled to discovery with respect to the judge's recusal decision" and, "[i]f a judge erroneously fails to recuse, do we apply harmless-error review?" *Id.* at 2271-2272. As he suggests, the ramifications of *Caperton* are broad. This Court should seriously consider how to properly dispose of a "*Caperton* claim"[12] alleging that the probability of a justice's bias disqualifies that justice under the Due Process Clause.

I would thus invite thorough supplemental briefing on these significant issues before disposing of the MCCA's recusal motion. Because the majority has chosen to precipitously resolve this disqualification motion, I dissent.

YOUNG, J. Consistent with the Court's 170-year-old disqualification practice, I do not participate in the determination whether Justice HATHAWAY should disqualify herself. I join in Justice CORRIGAN's dissenting statement concerning the *Caperton*[1] question. I believe that this new United States Supreme Court opinion has radically altered the landscape of judicial disqualification and this change warrants that this Court *at least* entertain argument by the parties about how *Caperton* might affect the pending disqualification motion.

However, given Justice HATHAWAY's stated position on disqualification matters, I also write to raise questions about the casual way she has chosen to decide this motion and how her response may bear on the extra-constitutional disqualification proposals currently under consideration by this Court.

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[12] See *Caperton*, 129 S Ct at 2274 (Scalia, J., dissenting).

[1] *Caperton v A T Massey Coal Co, Inc*, 556 US ___ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

Few issues have been the subject of more continual and contentious debate on this Court in the last decade than the appropriate standard that should apply in the disqualification of justices.[2] Justice Hathaway, who is now the subject of a disqualification motion in these cases, dismisses our efforts to comment on this issue as "inappropriate," "unnecessary," and a waste of taxpayer dollars. Such questions, however, are a traditional part of the debate and discussion inherent in the judicial process. It is, for example, why this Court holds oral arguments, and why it welcomes briefs, responses to briefs, and even replies to responses to briefs. By this process we educate ourselves and hopefully arrive at better decisions. Justice Hathaway either fails to appreciate the nature of the judicial process or simply seeks to avoid the hard questions about the inadequacies of her own extraordinarily limited response to the disqualification motion. *This is particularly evident because one of the central themes of Justice Hathaway's late Michigan Supreme Court campaign was her assertion that she subscribed to an "appearance of impropriety" disqualification standard and was, therefore, "more ethical" than the members of the previous philosophical majority*—former Chief Justice Taylor and Justices Corrigan and Markman and I.[3]

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[2] See, e.g., *Adair v Michigan*, 474 Mich 1027, 1038-1039 (2006) (statement of Taylor, C.J., and Markman, J.); *Grievance Administrator v Fieger*, 476 Mich 231, 266-281 (2006) (opinion by Taylor, C.J., and Corrigan, Young, and Markman, JJ.); *Scalise v Boy Scouts of America*, 473 Mich 853 (2005); *In re JK*, 468 Mich 202, 219 (2003) (statement by Weaver, J.); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), reconsideration denied 469 Mich 889 (2003). Justice Weaver has also provided her own personalized history of this debate in her statement endorsing Justice Hathaway's continued participation in these cases.

[3] The following was part of Justice Hathaway's campaign: "Our Supreme Court is not being fair and impartial. . . . They are not recusing themselves and that is the problem; we need judges who are going to be

THE NATURE OF THE ALLEGATIONS AGAINST JUSTICE HATHAWAY

Defendant Michigan Catastrophic Claims Association (MCCA) has asserted that Justice HATHAWAY's husband is a no-fault plaintiffs' attorney who stands to profit in his no-fault practice if Justice HATHAWAY participates in these cases to overturn a decision made by this Court just months ago. The thrust of this claim is that a reversal of our earlier opinion will remove the legal basis, and thus the incentive, for insurance companies to resist unreasonable no-fault settlements demanded by claimants and their attorneys. Consequently, because insurance companies will be free to pass on these unreasonable settlements to the MCCA (which will eventually be paid for by the public, who must buy no-fault insurance), no-fault practitioners will increase their contingency fee yields by obtaining higher settlements than warranted.[4] A reversal will cost

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fair and impartial in rendering their decisions and that is not happening." Interview with Lansing State Journal (October 17, 2008). She quipped that former Chief Justice TAYLOR was a "walking conflict of interest" because his wife had worked in the Governor's office. <http://www.youtube.com/watch?v=_7woWJDk1Qg> (accessed June 16, 2009). It was never alleged that former Chief Justice TAYLOR's wife stood to benefit financially from her husband's role on this Court, as defendant here suggests that Justice HATHAWAY's husband will. See *Adair*, *supra* at 1028 n 1. Finally, Justice HATHAWAY pledged to the people who elected her, "I have, and I will continue to disqualify myself *whenever there is the appearance of impropriety*," League of Women Voters of Michigan Voter Guide 2008 <http://www.lwvmi.org/documents/LWV08SupremeCourt.pdf> (accessed June 16, 2009) (emphasis added), and, "I have a habit of recusing myself if I think that there is even an appearance of impropriety," Interview with Lansing State Journal (October 17, 2008).

[4] The MCCA is a nonprofit association created by the Legislature to ensure that there are sufficient resources to fund benefits under our no-fault law for the catastrophically injured. See MCL 500.3104. Under our prior decision, the MCCA has authority to reject *unreasonable* claims when a member insurer's policy only provides coverage for "reasonable charges." *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 482 Mich 414, 417 (2008). The MCCA contends

purchasers of Michigan no-fault insurance an aggregate of $693.8 million more this year alone, accounting, in large part, for a more than 19 percent increase in the catastrophic claims premium every automobile no-fault insurance policy issued in this state will bear, which increase the MCCA's board of directors has already approved in anticipation of Justice HATHAWAY's critical vote to reverse the Court's prior decision. See the affidavit filed by the MCCA in Docket No. 133466, which is one of the documents referred to in n 2 of Justice HATHAWAY's statement.

Despite this, and without bothering to explain why, Justice HATHAWAY simply denies that she should be disqualified, adding that there is no appearance of impropriety in her participation. Justice HATHAWAY does not even deign to deny that her husband is a no-fault plaintiffs' practitioner or to assert that his practice will not benefit from her participation in a decision to overturn this Court's prior decision.

Justice HATHAWAY's refusal to live up to her own expressed standard of conduct is worthy of note in its own right: The people of this state deserve to know whether candidates promise one thing when running for office but deliver another when elected. But the far more important issue is the horror that would be visited on this Court if Justice HATHAWAY's preferred "appearance of impropriety" disqualification standard were actually adopted.

HOW MAY A JUSTICE REBUT AN "APPEARANCE OF IMPROPRIETY"?

Justice HATHAWAY has provided *no* information in response to defendant's allegations of her family's fi-

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that a reversal of the Court's decision will cause a dramatic increase in its exposure and the cost of insurance that it will pass along to the purchasers of no-fault insurance.

nancial interest in a reversal of the Court's prior decision; surely her terse and conclusory statement is not what the people envisioned when they elected a candidate vowing to adhere to a "higher" "appearance of impropriety" disqualification standard. *Ought not such a standard require that the target of the disqualification motion provide financial statements*[5] *or that an evidentiary hearing be conducted to determine the merit of the allegations of disqualification*?[6]

WHAT SUFFICES TO ESTABLISH AN "APPEARANCE OF IMPROPRIETY"?

According to Justice HATHAWAY, allegations of a spouse's "economic interest in the subject matter in controversy" or "more than de minimis interest that could be substantially affected by the proceeding"—grounds requiring recusal under MCR 2.003(B)(5) and (6)(c)—are so irrelevant as to not even merit a discussion in her statement. *If these allegations of increased*

[5] During her campaign, Justice HATHAWAY affirmatively supported other financial disclosures: "I believe that there should be disclosure of all election campaign spending." Michigan Campaign Finance Network, Questionnaire for 2008 Michigan Supreme Court Candidates, p 1 <http://www.mcfn.org/pdfs/reports/SCquestionnaire.pdf> (accessed June 16, 2009). Indeed, several member organizations of the Coalition Protecting Auto No-Fault, which has filed an amicus curiae brief in these cases supporting Justice HATHAWAY's continued participation, supported Justice HATHAWAY's campaign. The Michigan Trial Lawyers Association and the United Automobile Workers each gave $34,000 to Justice HATHAWAY's campaign, the maximum allowed by law. During her campaign, Justice HATHAWAY stated that "a judge should consider[] disqualifying herself in any instance where a party has made a substantial campaign contribution." *Id.* In Justice HATHAWAY's calculus of disqualification ethics, do such contributions not raise "even the *mere appearance* of impropriety"? *Id.* at 2.

[6] And why, having promised a "higher standard of conduct" if elected, is it defensible for Justice HATHAWAY to shelter under the Court's historical disqualification practice that she disparaged on the campaign trail?

family profit as a result of her participation in these cases do not establish an appearance of impropriety, what would?[7]

WHO WILL DETERMINE WHETHER THERE IS AN "APPEARANCE OF IMPROPRIETY"?

For the first time to my knowledge, members of the Court have participated in the merits of a disqualification decision on a motion addressed to another justice. Although Justices Cavanagh and Weaver and Chief Justice Kelly have joined *and endorsed* Justice Hathaway's decision, they have done so *solely* on the basis of Justice Hathaway's statement without any additional inquiry into the merits of her participation or the allegations raised. In this, their participation is merely a rote ratification of Justice Hathaway's cursory denial of the motion to disqualify.

The new majority's approval of and participation in the merits of the determination whether Justice Hathaway should be disqualified, while an alteration of our traditions, *is* consistent with several of the Court's pending disqualification proposals that require full Court participation or that of the Chief Justice.[8] With

[7] Moreover, do the fact that the motion for rehearing in these cases was prompted *solely* because of Justice Hathaway's replacement of Chief Justice Taylor and the fact that utterly no new substantive or legal arguments were raised in the motion, as generally required by MCR 2.119(F)(3), give rise to an appearance of impropriety with respect to her participation? See, e.g., *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), in which this Court opined that "a rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place or is about to occur."

[8] It is unclear why Justice Hathaway and the new majority chose to adopt some aspects of the new proposals while claiming to adhere to our current disqualification practice. As stated, Justices Cavanagh and Weaver and Chief Justice Kelly have *never*, to my knowledge, publicly endorsed the decision of another justice targeted with a disqualification

out question, lodging such a determination with other justices of this Court will, at best, lead to gamesmanship to change the philosophical composition of the Court to alter the result in each such case. I ask: Would a 4-3 decision by the members of the Court favoring participation of a challenged justice cause the public to have greater or lesser faith that the targeted justice should ethically participate?

HOW WOULD SUCH A PROCEDURE BETTER SERVE THE PEOPLE OF THIS STATE THAN THE NEARLY 200-YEAR-OLD CURRENT DISQUALIFICATION PRACTICE?

These are but a *few* of the questions raised by Justice HATHAWAY's disposition of the pending motion to disqualify her. Given Justice HATHAWAY's campaign promises and our colleagues' published statements on disqualification over the years, not only the parties, but the public deserve more.

MARKMAN, J. Defendant has moved for Justice HATHAWAY's disqualification, arguing that "her spouse has an interest that could be substantially affected by the outcome of the proceedings." Justice HATHAWAY now denies this motion, concluding that she has "no personal bias or prejudice," that there is "no appearance of impropriety," and that there is "nothing alleged . . . that would cause any reasonable person to believe that there is a significant and disproportionate influence being asserted upon me," with little to no explanation. This decision must be viewed against a backdrop in which Justice HATHAWAY has been free in her criticism of other justices for their disqualification decisions. (For example, assert-

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motion, as they have done here. However, because they considered nothing beyond Justice HATHAWAY's statement, it is hard to understand what their endorsement adds, other than being a statement of solidarity.

ing that the former Chief Justice of this Court was a "walking conflict of interest" because his wife worked for the Governor's office; stating that "our Supreme Court is not being fair and impartial . . . [;] they are not recusing themselves and that is the problem; we need judges who are going to be fair and impartial in rendering their decisions and that is not happening"; and proclaiming that, "I have, and I will continue to disqualify myself whenever there is the appearance of impropriety.")[1] Justice Hathaway has also supported this Court's decision to propose new procedures that would require disqualification whenever there is an "appearance of impropriety." ADM File No. 2009-4; see 483 Mich 1205 (2009). Finally, the United States Supreme Court's decision a few weeks ago in *Caperton v A T Massey Coal Co, Inc,* 556 US __ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), held that disqualification must now be determined on the basis of "objective standards." Given this backdrop, it is difficult to understand why Justice Hathaway believes that her conclusory response to defendant's motion is sufficient. Contrary to her justification for her unwillingness to explain her position ("I will not participate in this Court's practice of engaging in responses to comments of others that are inappropriate and unnecessary. This Court should discontinue devoting the state's limited resources to unproductive colloquy."), it is hardly to take the high ground for a justice to decline to address questions that have been raised by the parties and by other justices, and that are a direct outgrowth of that justice's own reform proposals, her own past criticisms of other justices, and a recent decision of the United States Supreme Court. Given that

[1] <http://www.youtube.com/watch?v=_7woWJDk1Qg> (accessed June 18, 2009); Interview with Lansing State Journal, October 17, 2008; and League of Woman Voters of Michigan Voter Guide 2008 <http://www.lwvmi.org/documents/LWV08SupremeCourt.pdf> (accessed June 18, 2009), respectively.

Caperton was decided just a few weeks ago, and in fairness to the parties, I would direct the filing of supplemental briefs. Among the questions I would direct the parties to address are whether all justices must now participate in deciding another justice's disqualification and whether the justice who is the object of disqualification may even participate. Absent such briefing, I am not yet prepared to deviate from this Court's practice of 172 years to the contrary. Therefore, I neither participate in nor address the merits of Justice HATHAWAY's decision not to grant defendant's motion.

McNEIL v CHARLEVOIX COUNTY

Docket No. 134437. Argued January 22, 2009 (Calendar No. 9). Decided July 21, 2009.

Kent A. McNeil and other residents or business owners in Charlevoix County brought an action in the Charlevoix Circuit Court against Charlevoix County and Northwest Michigan Community Health Agency (NMCHA), a multicounty district health department organized by Antrim, Charlevoix, Emmet, and Otsego counties. The NMCHA had promulgated a regulation that prohibits smoking in all enclosed public places, requires employers that do not wholly prohibit smoking at an enclosed work site to designate an NMCHA-approved, independently ventilated smoking room, and prohibits an employer from discharging, refusing to hire, or otherwise retaliating against an employee for exercising his or her right to the smoke-free environment created by the regulation. The plaintiffs sought a judgment declaring the regulation invalid. The court, Richard M. Pajtas, J., denied a motion for summary disposition filed by the plaintiffs, who then appealed. The Court of Appeals, SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ., affirmed, holding that the NMCHA acted within its authority when it promulgated the regulation at issue, that the regulation was not preempted by the Michigan Clean Indoor Air Act, and that the provision of the regulation that prohibits employers from discharging, refusing to hire, or otherwise retaliating against employees for exercising their right to a smoke-free environment did not violate the public policy of allowing employment terminable at will. 275 Mich App 686 (2007). The plaintiffs applied for leave to appeal, which the Supreme Court granted with respect to those plaintiffs who had standing. 482 Mich 1014 (2008).

In an opinion by Justice WEAVER, joined by Chief Justice KELLY and Justices CAVANAGH and HATHAWAY, the Supreme Court *held*:

The regulation at issue is authorized by statute and was promulgated in a manner consistent with the statutory requirements. Furthermore, the private cause of action that the regulation creates fits within public policy exceptions to Michigan's at-will employment doctrine.

1. The NMCHA acted within its authority when it promulgated the regulation at issue. Part 126 of the Public Health Code (PHC), MCL 333.12601 *et seq*., which governs smoking in public places and is also known as the Michigan Clean Indoor Air Act, expressly provides that the Michigan Department of Community Health may authorize a local health department like the NMCHA to enforce part 126 and the rules promulgated under that part. MCL 333.12613(2). Even if the responsibility for the implementation and enforcement of the restrictions established by part 126 had been exclusively granted to the Department of Community Health, that would not, by itself, deny a local health department the authority to promulgate, implement, and enforce similar regulations of its own making. Part 24 of the PHC, MCL 333.2401 *et seq*., which governs local health departments like the NMCHA, charges local health departments with the duty to continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including those for the prevention and control of environmental health hazards. MCL 333.2433(1). Part 24 also provides that a local health department may adopt regulations to properly safeguard the public health, MCL 333.2435(d), or regulations that are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department, MCL 333.2441(1). Finally, part 24 provides that a local health department shall implement and enforce laws for which responsibility is vested in the local health department. MCL 333.2441(1).

2. The provision in the regulation that prohibits an employer from discharging, refusing to hire, or otherwise retaliating against a person for exercising his or her right to a smoke-free environment does not violate the public policy of allowing employment terminable at will by either employer or employee. An at-will employee's discharge violates public policy if the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty, the employee is discharged for the failure or refusal to violate the law in the course of employment, or the employee is discharged for exercising a right conferred by a well-established legislative enactment. Although the regulation at issue is not a legislative enactment or statement, it provides employees with certain specified rights and was, as required by MCL 333.2411(1), approved by the governing bodies of each of the counties served by the NMCHA. Given this and the public policy of minimizing the effects of smoking evinced by the Legislature through its enactment of part 126 and § 12905 of part 129 of the PHC, MCL 333.12905 (which governs smoking in public areas of food service

establishments), the regulation's restriction on an employer's right to discharge an employee at will is consistent with the aforementioned exceptions.

Justice CAVANAGH, joined by Chief Justice KELLY, concurring, wrote separately to clarify that the non-retaliation provision of the clean indoor air regulation promulgated by the defendants falls within the public-policy exception to the common-law doctrine of at-will employment for employees acting in accordance with a legally recognized right or duty. He further stated that the sections of the regulation that create a private cause of action were within the broad constitutional and statutory authority granted to county boards of commissioners to pass ordinances that relate to county affairs and do not contravene the general laws of this state.

Affirmed.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, concurring in part and dissenting in part, agreed that the NMCHA, acting in conjunction with the local boards of commissioners, has the authority to enact that part of the regulation that restricts smoking at least as stringently as the Michigan Clean Indoor Air Act. He dissented from the majority's implicit ruling that the part of the regulation that creates a private cause of action against private employers is valid and would hold instead that MCL 46.11(j) precludes a county board of commissioners from creating a private cause of action against a private entity that alters Michigan's at-will employment doctrine. He also dissented from the conclusion that the part of the regulation that restricts smoking fits within one of the exceptions to at-will employment recognized in the *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692 (1982), and generally would not extend the *Suchodolski* exceptions to include local regulations. He would remand this case to the Court of Appeals to consider whether employees could enforce their rights under the regulation restricting smoking by bringing an action under the Whistleblowers' Protection Act.

1. HEALTH — LOCAL HEALTH DEPARTMENTS — SMOKING REGULATIONS.

A local health department created pursuant to part 24 of the Public Health Code has the authority under that part and part 126, also known as the Michigan Clean Indoor Air Act, to promulgate, implement, and enforce regulations in indoor public places that are at least as stringent as those established by state law (MCL 333.2433[1], 333.2435[d], 333.2441[1], and 333.12613[2]).

2. HEALTH — LOCAL HEALTH DEPARTMENTS — SMOKING REGULATIONS.

A regulation by a local health department created pursuant to part 24 of the Public Health Code that prohibits smoking in all enclosed

public places and requires employers that do not wholly prohibit smoking at an enclosed work site to designate a department-approved smoking room for those of its employees who smoke does not conflict with part 126 of the Public Health Code, also known as the Michigan Clean Indoor Air Act (MCL 333.2401 *et seq*. and 333.12601 *et seq*.).

3. HEALTH — LOCAL HEALTH DEPARTMENTS — SMOKING REGULATIONS — EMPLOYMENT — AT-WILL EMPLOYMENT.

A regulation by a local health department created pursuant to part 24 of the Public Health Code that prohibits an employer from discharging, refusing to hire, or otherwise retaliating against an employee for exercising his or her right to a smoke-free working environment mandated by the regulation does not violate the public policy of recognizing the right to terminate employment at will (MCL 333.2401 *et seq*.).

Foster, Swift, Collins & Smith, P.C. (by *Samuel J. Frederick*), for Scott Way and Jeff Legato.

Young, Graham, Elsenheimer & Wendling, P.C. (by *James G. Young* and *Dennis M. LaBelle*), for Northwest Michigan Community Health Agency.

Amici Curiae:

Cohl, Stoker, Toskey & McGlinchey, P.C. (by *Peter A. Cohl* and *Richard D. McNulty*), for the Michigan Association of Counties and the Michigan Association for Local Public Health.

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C. (by *John H. Bauckham* and *Robert E. Thall*), for the Michigan Townships Association.

WEAVER, J. At issue in this case is whether MCL 333.2441(1) authorizes a local health department to create, and a county board of commissioners to approve, regulations that control smoking in the workplace. Additionally at issue is whether such a regulation,

providing employees with a private cause of action to seek its enforcement, interferes with Michigan's at-will employment doctrine.

I. THE COURT OF APPEALS DECISION

The Court of Appeals concluded that the regulation at issue is authorized by statute and was promulgated in a manner consistent with the statutory requirements. Furthermore, the Court of Appeals concluded that the private cause of action created by the regulation fits within public policy exceptions to Michigan's at-will employment doctrine. We agree with the Court of Appeals' conclusions. In affirming, we adopt as our own the Court of Appeals' opinion, *McNeil v Charlevoix Co*, 275 Mich App 686; 741 NW2d 27 (2007)[1]:

> In this action for declaratory relief, plaintiffs appeal as of right the trial court's order denying their motion for summary disposition. We affirm.
>
> I. BASIC FACTS AND PROCEDURAL HISTORY
>
> Defendant Northwest Michigan Community Health Agency (NMCHA) is a multicounty district health department organized by Antrim, Charlevoix, Emmet, and Otsego counties under Part 24 of the Public Health Code (PHC), MCL 333.2401 *et seq*.[1] In purported furtherance of its duty to protect the public health and welfare in its district, the NMCHA promulgated what it entitled the Public Health Indoor Air Regulation of 2005 (the regulation). In addition to prohibiting smoking in all public places, the regulation requires employers who do not wholly prohibit smoking at an enclosed place of employment to designate an NMCHA-approved smoking room,

[1] We have eliminated only that portion of the Court of Appeals opinion that addresses the issue of preemption, because we do not believe that a preemption analysis is necessary for the resolution of the issues before us at this time. We do not disturb the Court of Appeals' ruling on that issue.

which is required by the regulation to be "a separate enclosed area that is independently ventilated so that smoke does not enter other non-smoking areas of the worksite." The regulation additionally prohibits an employer from discharging, refusing to hire, or otherwise retaliating against an employee for exercising his or her right to the smoke-free environment afforded by the regulation.

After the regulation was approved by each of the four counties, plaintiffs, each of whom resides or operates a business within defendant Charlevoix County, brought this action to invalidate the regulation by judicial declaration that the NMCHA was without authority to promulgate such a regulation and that the regulation itself was preempted by Part 126 of the PHC, MCL 333.12601 *et seq*., which prohibits smoking in buildings used by the public except in designated areas. In seeking summary disposition on these grounds, plaintiffs argued that nothing in Part 126 of the PHC, which is also known as the Michigan Clean Indoor Air Act (MCIAA),[2] authorizes a local health department to enforce or augment the smoking restrictions set by the MCIAA. Plaintiffs further argued that § 12605 of the MCIAA, MCL 333.12605, grants owners and operators of public places the discretion to choose whether to maintain a smoking section or remain smoke-free, and that this discretion to permit smoking in public places constitutes a statutorily conferred right that a local health department cannot annul by regulation. Moreover, plaintiffs argued, where the owner or operator of a public place chooses to have a designated smoking area, § 12605 requires only that existing physical barriers and ventilation be used to minimize the toxic effects of smoking. Thus, insofar as the NMCHA regulation requires that smoking be restricted to a separate, enclosed area with independent ventilation, it conflicts with the MCIAA and must be found to be invalid.

Citing this Court's decision in *Michigan Restaurant Ass'n v City of Marquette*, 245 Mich App 63; 626 NW2d 418 (2001), plaintiffs further asserted that smoking is an issue better suited to regulation on a statewide basis, and that local regulation must therefore yield to the preemptive

provisions of the MCIAA. Plaintiffs additionally argued that, to the extent the regulation impinges on the common-law right of an employer to discharge an employee at will, the regulation violates public policy and is void. The trial court, however, disagreed and denied plaintiffs' motion. This appeal followed.

II. ANALYSIS

Plaintiffs assert that the trial court erred in denying their motion for summary disposition. In doing so, plaintiffs again argue that the NMCHA lacked the authority to promulgate regulations restricting smoking and that local regulation was, in any event, preempted by the MCIAA. We disagree.

A. STANDARD OF REVIEW

Resolution of the questions presented on appeal requires the interpretation of statutes, which is a question of law that this Court reviews de novo. See *Michigan Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003). When interpreting a statute, this Court's goal is to ascertain and give effect to the intent of the Legislature by applying the plain language of the statute. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003).

B. OVERVIEW OF THE MICHIGAN CLEAN INDOOR AIR ACT

The MCIAA, enacted in 1986 as Part 126 of the PHC,[3] prohibits smoking "in a public place or at a meeting of a public body, except in a designated smoking area." MCL 333.12603. Although seemingly broad in scope, "public place," as defined by the MCIAA, renders the act inapplicable to most private-sector workplaces and public areas that are not themselves enclosed. See MCL 333.12601(m).[4] Also exempt from the requirements of the act are food service establishments,[5] MCL 333.12603(3), private educational facilities "after regularly scheduled school hours," MCL 333.12603(4), and enclosed private rooms or offices

occupied exclusively by a smoker, "even if the room or enclosed office may be visited by a nonsmoker," MCL 333.12601(2). Further, the MCIAA expressly does not apply to "a room, hall, or building used for a private function if the seating arrangements are under the control of the sponsor of the function and not under the control of the state or local government agency or the person who owns or operates the room, hall, or building." MCL 333.12603(2).

In all other public places in which smoking is not "prohibited by law," the MCIAA permits a "person who owns or operates a public place" to designate a smoking area. MCL 333.12605(1).[6] In those public places in which an owner or operator elects to designate a smoking area, the act requires that "existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in both smoking and adjacent nonsmoking areas." MCL 333.12605(1).[7] The act further requires that seating within the public place be arranged "to provide, as nearly as practicable, a smoke-free area," MCL 333.12607(b), and that the owner or operator develop, implement, and enforce "a written policy for the separation of smokers and nonsmokers which provides, at a minimum," for a procedure to receive, investigate, and take action on complaints, and that ensures that nonsmokers will be located closest to the source of fresh air and that special consideration will be given to individuals with a hypersensitivity to tobacco smoke, MCL 333.12605(3); see also MCL 333.12607(c).

C. AUTHORITY OF THE NMCHA TO PROMULGATE SMOKING REGULATIONS

In challenging the validity of the regulation promulgated by the NMCHA, plaintiffs assert that nothing in Part 126 of the PHC authorizes a local health department to enforce or augment the smoking restrictions set by the MCIAA.[8] Plaintiffs argue that, pursuant to MCL 333.12613, implementation and enforcement of the act and rules promulgated thereunder is a power within the exclusive province of the Michigan Department of Community Health. Plaintiffs' argument in this regard, however, is not sustained by the plain language of § 12613(2) of Part 126,

which expressly provides that "the department may authorize a local health department to enforce this part and the rules promulgated under this part." MCL 333.12613(2).

Moreover, even if the responsibility for the implementation and enforcement of the restrictions established by Part 126 had been exclusively granted to the Department of Community Health, that would not, by itself, deny a local health department the authority to promulgate, implement, and enforce similar regulations of its own making. As previously noted, Part 24 of the PHC authorizes the creation of local health departments such as the NMCHA. See MCL 333.2415 and 333.2421. Pursuant to § 2433 of Part 24, such departments are charged with the duty to

"continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law. [MCL 333.2433(1).]"

The regulation at issue is consistent with these duties and is authorized to be promulgated by the NMCHA under §§ 2435 and 2441 of Part 24, which provide that a local health department may "[a]dopt regulations to properly safeguard the public health," MCL 333.2435(d), or regulations that "are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department," MCL 333.2441(1). See also MCL 333.2433(2)(a) (which provides that a local health department "shall . . . [i]mplement and enforce laws for which responsibility is vested in the local health department"). As argued by defendants, the only limitation placed by the Legislature on the promulgation and adoption of such regulations is that they "be at least as stringent as the standard established by state law applicable to the same or similar subject matter." MCL 333.2441(1).[9] The regulation

at issue here, being more restrictive than the standards set by the MCIAA, meets this requirement.

We recognize plaintiffs' argument that, under a plain reading of § 2433(1), the fulfillment of the duties imposed by that section on local health departments is arguably limited to the institution of programs. The section must, however, be read in context and in light of the purpose of both Part 24 and the PHC in general. See *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). As noted earlier, MCL 333.2435(d) expressly grants a local health department authority to "[a]dopt regulations to properly safeguard the public health." Plaintiffs assert that the Legislature has also granted local health departments more specific powers.[10] However, that does not lessen the general duty and authority of those agencies to protect the public health, MCL 333.2433(1), and to adopt and implement regulations for that purpose, MCL 333.2435(d) and 333.2441(1). In fact, the preliminary provisions of the PHC require that the code and each of its various parts "be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2); see also MCL 333.2401(2) (stating that the "general definitions and principles of construction" contained in article 1 of the PHC, MCL 333.1101 *et seq*., are "applicable to all articles in this code"), and *Frens Orchards, Inc v Dayton Twp Bd*, 253 Mich App 129, 134-135; 654 NW2d 346 (2002) (applying the preliminary provisions of the PHC to Part 124 of the code, regulating agricultural labor camps). Because, when so construed, the provisions of Part 24 evince a legislative intent to permit regulation of the kind at issue here, we reject plaintiffs' assertion that the NMCHA was without authority to promulgate the regulation.

* * *

E. EMPLOYMENT AT WILL

Finally, plaintiffs argue that because the regulation's provision that an employer cannot discharge, refuse to hire, or otherwise retaliate against a person for exercising

his or her right to a smoke-free environment adversely affects the common-law right of an employer to discharge an employee at will, the NMCHA regulation violates public policy and is therefore void. Again, we disagree.

Plaintiffs correctly argue that, in the absence of a contract providing to the contrary, employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). It is well settled, however, that an employer is not free to discharge an employee at will when the reason for the discharge contravenes public policy. See *id*. at 695.

In *Suchodolski*, *supra* at 695-696, our Supreme Court provided three examples of public-policy exceptions to an employer's right to discharge an at-will employee under the employment at will doctrine. An at-will employee's discharge violates public policy if any one of the following occurs: (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty; (2) the employee is discharged for the failure or refusal to violate the law in the course of employment; or (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. *Id*.

Although not itself a legislative enactment or statement, the regulation at issue here provides employees with certain specified rights and was, as required by MCL 333.2441(1), approved for application by the governing bodies of each of the various counties served by the NMCHA.[17] Given these facts, and considering the public policy of minimizing the effects of smoking evinced by the Legislature through its enactment of Part 126 and § 12905 of Part 129 of the PHC, the regulation's restriction of the general right to discharge an employee at will is consistent with the exceptions to that doctrine set forth in *Suchodolski*. Accordingly, we reject plaintiffs' claim that the regulation's prohibition in this regard itself violates public policy and is therefore void.

Affirmed.

[1] Pursuant to § 2415 of Part 24, "[t]wo or more counties . . . , by a majority vote of each local governing entity and with approval of the [state] department [of community health], may unite to create a district health department." MCL 333.2415.

[2] See MCL 333.12616.

[3] See 1986 PA 198, effective January 1, 1987.

[4] MCL 333.12601(m)(*i*) defines "public place" as

"[a]n enclosed, indoor area owned or operated by a state or local governmental agency and used by the general public or serving as a place of work for public employees or a meeting place for a public body, including an office, educational facility, home for the aged, nursing home, county medical care facility, hospice, hospital long-term care unit, auditorium, arena, meeting room, or public conveyance."

Enclosed indoor areas that are not owned or operated by a state or local governmental unit, but are included in the definition of "public place" if used by the general public, include educational facilities, homes for the aged, nursing homes, county medical care facilities, hospices, hospital long-term care units, auditoriums, arenas, theaters, museums, concert halls, and "[a]ny other facility during the period of its use for a performance or exhibit of the arts." MCL 333.12601(m)(*ii*)(A)-(H).

[5] As discussed *infra*, smoking in food service establishments is nonetheless regulated under Part 129 of the PHC, MCL 333.12905 *et seq*.

[6] Note, however, that the MCIAA places slightly more stringent requirements on two types of facilities: child care and health facilities. In child care facilities or on property under the control of a child care facility, smoking is completely prohibited. MCL 333.12604. In health facilities, smoking is allowed only in a designated area that is "enclosed and ventilated or otherwise constructed to ensure a smoke free environment in patient care and common areas." MCL 333.12604a(2)(b). Further, in a health facility, patients may smoke only if a "prohibition on smoking

would be detrimental to the patient's treatment as defined by medical conditions identified by the collective health facility medical staff." MCL 333.12604a(2)(a). Patients who are permitted to smoke must, however, be in a separate room from nonsmoking patients. *Id*.

[7] However, "[i]n the case of a public place consisting of a single room, the state or governmental agency or person who owns or operates the single room" is considered to be in compliance with the act "if 1/2 of the room is reserved and posted as a no smoking area." MCL 333.12605(2).

[8] Although the trial court's failure to address the authority of the NMCHA to promulgate the regulation at issue renders the issue unpreserved for review on appeal, *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999), this Court may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). As presented both below and on appeal, the question whether the NMCHA is authorized to develop regulations restricting smoking presents an issue of statutory interpretation, which is a question of law for which the facts necessary for its resolution are sufficiently present to permit this Court's review. See *Michigan Coalition*, *supra* at 405.

[9] Unlike Part 24 of the PHC, the regulatory enabling statute at issue in *DABE, Inc v Toledo-Lucas Co Bd of Health*, 96 Ohio St 3d 250; 773 NE2d 536 (2002), does not contain a similar statement evincing a legislative intent to permit coequal regulation of the public health by a local health department. Thus, we reject plaintiffs' reliance on that case as support for their assertion that the NMCHA was without authority to promulgate the regulation at issue in this case.

[10] See, e.g., MCL 333.2455, which permits a local health department to "issue an order to avoid, correct, or remove . . . a building or condition which violates health

laws or which the local health officer . . . reasonably believes to be a nuisance, unsanitary condition, or cause of illness."

* * *

[17] MCL 333.2441(1) provides, in relevant part, that regulations adopted by a local health agency "shall be approved or disapproved by the local governing entity."

II. RESPONSE TO JUSTICE MARKMAN'S PARTIAL CONCURRENCE AND PARTIAL DISSENT

Justice MARKMAN agrees that the workplace smoking regulation at issue is "consistent with MCL 333.2433(1), at least to the extent it is designed to 'prevent disease, [and] prolong life.' " *Post* at 106. Therefore, Justice MARKMAN concludes that the county boards of commissioners acted within their statutory authority when regulating smoking in this particular case. Nevertheless, Justice MARKMAN contends that the anti-retaliation section of this regulation is invalid because it exceeds the legislative authority granted to the county boards of commissioners and, alternatively, because it contravenes the law of at-will employment in this state.

The anti-retaliation section of this regulation essentially ensures that an employee will not be terminated for asserting rights that were granted by the regulation. The Michigan Constitution provides that "[b]oards of supervisors shall have legislative, administrative and such other powers and duties as provided by law." Const 1963, art 7, § 8. The plain language of the PHC itself places a broad duty on local health departments to take necessary actions for preventing and controlling hazards to human health. Contrary to the partial dissent, we believe that the county boards of commissioners possessed the authority to adopt the anti-retaliation section of this regulation.

The Legislature grants county boards of commissioners the authority to "pass ordinances that relate to county affairs and do not contravene the general laws of this state . . . and pursuant to section 10b provide suitable sanctions for the violation of those ordinances." MCL 46.11(j). Section 10b provides that county boards of commissioners may impose a sanction of imprisonment for not more than 90 days or a fine of not more than $500 for the violation of an ordinance. MCL 46.10b(1). Additionally, through the PHC, the Legislature provides county boards of commissioners with the authority to approve local health department regulations that are "at least as stringent as the standard established by state law . . . ." MCL 333.2441(1).

It is important to note that the Legislature explicitly instructs that the PHC is to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2). The PHC expressly authorizes local health departments to "adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination." MCL 333.2435(d). In addition, the PHC *mandates* that local health departments "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, *including prevention and control* of environmental health hazards; *prevention and control* of diseases; [and] *prevention and control* of health problems of particularly vulnerable population groups . . . ." MCL 333.2433(1) (emphasis added). Furthermore, the PHC expressly directs local health departments to "[i]mplement and enforce laws for which responsibility is vested in the local health department." MCL 333.2433(2)(a).

As Justice CAVANAGH correctly points out, county boards of commissioners adopting regulations by ma-

jority vote are essentially functioning as local legislative bodies. In this case, the local health department, the NMCHA, created the regulation and submitted it to the boards for approval, just as MCL 333.2441(1) requires. The submitted regulation provides for a private cause of action against an employer who discharges an employee for asserting rights created by the regulation.

We have already concluded that the Legislature has not expressly limited the exact manner in which a local health department prevents and controls health hazards within its communities. In fact, local health departments are explicitly directed to take action to safeguard the public health. See MCL 333.2435(d); MCL 333.2433(1); MCL 333.2433(2)(a). We conclude that the anti-retaliation provision of this workplace smoking regulation is another method used by the local health department to prevent and control the health hazards caused by secondhand smoke inhalation.

In *Mack v Detroit*, 467 Mich 186, 189; 649 NW2d 47 (2002), this Court held that a city charter providing a private cause of action against the city itself for discrimination based on sexual orientation contravenes the governmental tort liability act and, therefore, such a cause of action will not be recognized. This Court reasoned that "a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Id*. at 195. Additionally, this Court noted that exceptions to governmental immunity are narrowly construed. *Id*. at 196 n 10. However, the majority in *Mack* expressly limited its analysis to the city's lack of authority in light of governmental immunity law and declined to address the question whether a city can create a private cause of action against *nongovernmental* entities. *Id*. at 197 n 12, 194 n 6.

Justice MARKMAN correctly observes that *Mack* involved a *city's* authority to create a private cause of action, while this particular case involves a *county's* authority to do so. *Post* at 109 n 4. However, we note that in *Mack*, the majority placed weight on the lack of legislative authorization for the city to create a cause of action and the limitations placed on municipalities by the Legislature. *Mack*, *supra* at 195-197. Here, the Legislature *has* expressly placed the affirmative duty on local health departments to take measures to safeguard human health, MCL 333.2433(1), and authorizes those departments to do so through regulations, MCL 333.2435(d). Again, the Legislature has explicitly instructed that the PHC be liberally construed. MCL 333.1111(2). The regulation imposes smoking restrictions under the stated purpose of protecting "the public health and welfare by regulating smoking in public places and places of employment and recreation in the counties which comprise this multi-county health department." Section 1011 of the regulation states that an employer may not retaliate against any employee, potential employee, or customer for exercising the right to a healthy work environment provided pursuant to the regulation. Furthermore, § 1012(F) provides that an employee or other private citizen may bring legal action to enforce this right.

While Justice MARKMAN acknowledges the constitutional and statutory authority granted to county boards of commissioners, he alternatively concludes that the private cause of action provision of the regulation at issue is invalid on the basis that it "contravenes the law of at-will employment in this state." *Post* at 108. We, instead, agree with the Court of Appeals that the private cause of action in this particular regulation falls within *Suchodolski*'s three examples of public policy exceptions to the common law at-will employment doctrine.

In *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982), this Court held that while either party to an employment contract for an indefinite term may generally terminate the employment at any time for any, or no, reason, "some grounds for discharging an employee are so contrary to public policy as to be actionable." Examples of exceptions to Michigan's at-will employment doctrine, as explained in *Suchodolski*, include "adverse treatment of employees who act in accordance with a statutory right or duty," an employee's "failure or refusal to violate a law in the course of employment," and an employee's "exercise of a right conferred by a well-established legislative enactment." *Id*. at 695-696.

Because the regulation grants employees the right to a smoke-free work environment, the retaliatory discharge of an employee exercising this right would constitute "adverse treatment of employees who act in accordance with a statutory right or duty." *Suchodolski*, *supra* at 695. Citing *Dudewicz v Norris-Schmid*, 443 Mich 68, 80; 503 NW2d 645 (1993), Justice MARKMAN argues that if the regulation is enforceable under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., then a public policy claim for its violation is not viable. *Post* at 112 n 8. We first note that *Dudewicz* involved an employee who filed a criminal complaint against a fellow employee and was then discharged. In this case, we are simply concerned with the county's *authority* to adopt the anti-retaliation provision and provide for a private cause of action in order to enforce its regulations, and the WPA does not effectively negate the authority granted by the Legislature in the PHC. Furthermore, in *Dudewicz* this Court only reviewed the Court of Appeals' application of *Suchodolski* in light of the first example of exceptions to the at-will employment doctrine. *Id*. at 72.

Because the private cause of action in the regulation also constitutes the "exercise of a right conferred by a well-established legislative enactment," we disagree with Justice MARKMAN that it is necessary to remand this case in order to consider whether the regulation at issue may be enforced under the WPA. Part 126 of the PHC was clearly enacted by the Legislature in an effort to minimize the toxic effect of smoking. See MCL 333.12605. Pursuant to the authority granted by the Legislature, the county boards of commissioners adopted the regulation in an effort to further that same goal. Again, the regulation was adopted by the county boards of commissioners while they were functioning as local legislative bodies and exercising the authority granted to them by the Legislature in the PHC. In addition, the Legislature expressly authorizes a local health department to enforce part 126, and rules promulgated under it, by any "appropriate action authorized by law." MCL 333.12613(2). Therefore, we agree with the Court of Appeals' conclusion that the regulation was enacted pursuant to the authority granted by the Legislature in MCL 333.2433(1), and the plain language of MCL 333.12613(2) does not limit the enforcement of such regulations to state departments of community health.

III. CONCLUSION

Given the Legislature's statutory mandates to minimize the toxic effects of smoking on human health, the authority granted in the PHC to local health departments to prevent and control human health hazards and the facts of this particular case, we disagree with the partial concurrence and partial dissent's view that the *Suchodolski* exceptions to the at-will employment doctrine cannot possibly apply here. We, therefore,

adopt the Court of Appeals' opinion, which correctly concluded that the NMCHA and the local boards of commissioners were authorized to enact the regulation.

Affirmed.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with WEAVER, J.

CAVANAGH, J. (*concurring*). I concur in full with the majority opinion, including its conclusion that the clean indoor air regulation (CIAR) should be upheld. I would hold that the CIAR, including §§ 1010(F), 1011, and 1012(F), is within the scope of the authority delegated by the state constitution and the applicable statutes to the Northwest Michigan Community Health Agency (NMCHA) and the county boards of commissioners. I further agree that the non-retaliation provision of the CIAR, § 1011, falls within the public-policy exception to the common-law at-will employment doctrine. I write separately in order to clarify my views on the proper application of *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692; 316 NW2d 710 (1982), to this case and to further respond to Justice MARKMAN's opinion.

I. NON-RETALIATION PROVISION

A. *SUCHODOLSKI* ANALYSIS

This Court asked the parties to address whether the non-retaliation provision in the CIAR, § 1011, is consistent with *Suchodolski*. *McNeil v Charlevoix Co*, 482 Mich 1014, 1014-1015 (2008).[1] I think that § 1011 of the CIAR falls squarely within *Suchodolski*'s first ex-

[1] Section 1011 of the CIAR reads: "No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee,

ample of a public policy creating an exception to the general rule of at-will employment.

Under the common law, there is a general rule of at-will employment, meaning that "[i]n general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski*, 412 Mich at 694-695. As discussed in the majority opinion, *Suchodolski* recognized that, under the common law, there is an exception to the general at-will rule when the basis for termination is contrary to public policy. *Id.* at 695. *Suchodolski* stated that "an exception has been recognized to [the common-law at-will employment] rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* In addition to explaining the general public-policy exception, *Suchodolski* provided three examples of public policies that fall within the exception. *Id.* at 695-696.[2]

I would hold that § 1011 of the CIAR falls within the first example provided in *Suchodolski* of a public policy that creates an exception to the general rule of at-will employment. The first *Suchodolski* example is an explicit legislative statement that prohibits the discharge of an employee in retaliation for that employee's acting in accordance with a legally recognized right or duty. *Suchodolski*, 412 Mich at 695. This is precisely what § 1011 is. Section 1011 provides that "[n]o person or employer shall discharge, refuse to hire or in any

applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this regulation."

[2] As discussed here, I think that § 1011 of the CIAR falls within at least the first *Suchodolski* example. But even if it did not, I would hold that it is within the general public-policy exception.

manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this regulation." The county boards of commissioners that organized the NMCHA adopted the CIAR by a majority vote. They are local legislative bodies and were exercising the legislative power granted to them by the constitution and statutes of our state.[3] Thus, the CIAR qualifies as a legislative statement. Further, an employee's right to a smoke-free environment is a legally recognized right under the CIAR.[4] Finally, the CIAR explicitly prohibits discharging an employee in retaliation for that employee's exercise of a legally recognized right. Therefore, I would hold that § 1011 of the CIAR falls within *Suchodolski*'s first example of a public policy that constitutes an exception to the common-law at-will employment doctrine.[5]

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[3] See Const 1963, art 7, § 8; MCL 46.11; MCL 333.2441(1).

[4] *Suchodolski* referred to protection for employees acting in accordance with a "statutory" right or duty, but, in the context of the purpose of the exception, there is no reason to differentiate a legally recognized right or duty created by a state statute and a legally recognized right or duty created by local law. See also *Gale v Oakland Co Bd of Supervisors*, 260 Mich 399, 404; 245 NW 363 (1932), stating that "[a]n act passed by [the county board of commissioners] pursuant to authority delegated or conferred by the legislature has the same force as a statute passed by the legislature itself." (Quotation marks and citation omitted.)

[5] This analysis is not inconsistent with *Dudewicz v Norris-Schmid*, 443 Mich 68, 78-80; 503 NW2d 645 (1993). *Dudewicz* held that the Whistleblowers' Protection Act (WPA) preempted a claim under the public-policy exception to the at-will employment rule because the WPA provides an exclusive remedy for a violation of its non-retaliation provision. *Dudewicz*, 443 Mich at 78-80. Therefore, *Dudewicz* limits the first *Suchodolski* example of a public-policy exception to the at-will employment rule only where a legislative enactment has not only explicitly prohibited the discharge of an employee acting in accordance with a statutory right or duty, but also provided an exclusive remedy for

violation of that explicit prohibition. Accord *Humenny v Genex Corp*, 390 F3d 901, 907-908 (CA 6, 2004) (stating that because *Dudewicz* limited *Suchodolski*'s public-policy exception "by holding that 'as a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative,' " when applying the public-policy exception, the Court should first determine whether there is "a well-established legislative enactment that addresses the particular conduct at issue," and then, if there is, address whether the statute "provides a remedy to plaintiffs who allege violations of the statute"). To the extent that *Vagts v Perry Drug Stores*, 204 Mich App 481, 485; 516 NW2d 102 (1994), held otherwise, I would overrule it.

Justice MARKMAN asserts that I have misread *Dudewicz*, but I respectfully submit that my reading of *Dudewicz* is the understanding advanced by the *Dudewicz* Court, as evidenced by the opinion as a whole, and the Court of Appeals cases relied on in *Dudewicz*. Justice MARKMAN argues that *Dudewicz* excludes application of the public-policy exception in all instances where a statute or regulation "prohibits discharge in retaliation for the conduct at issue." *Post* at 113 n 8. To support this proposition, he relies on the statement in *Dudewicz* that " '[a] public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue.' " *Post* at 112 n 8, quoting *Dudewicz*, 443 Mich at 80. That statement supports Justice MARKMAN's argument if read standing alone, but in my judgment the context of the opinion shows that the Court intended to limit the public-policy exception only in instances in which a legislative enactment both provides an anti-retaliation provision and also creates an exclusive remedy. *Dudewicz* held that the Court of Appeals "should have found that any public policy claim was preempted by the application of the WPA," reasoning that "as a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative," and because there was no common-law counterpart to the WPA, "[t]he remedies provided by the WPA . . . are exclusive . . . ." *Id*. at 78-79. The Court thus concluded that "because the WPA provides relief to [the plaintiff] for reporting his fellow employee's illegal activity, his public policy claim is not sustainable." *Id*. at 80. In other words, *Dudewicz* held that where the WPA applies, the public-policy exception to the common-law at-will employment doctrine is preempted because the party was afforded relief by the WPA's exclusive statutory remedy. This reasoning does not suggest that a non-retaliation provision in a legislative enactment would, standing alone, preempt a public-policy claim if the legislative enactment either did not provide a remedy or if the remedy provided was not exclusive.

Further, this understanding of the public-policy exception is the same understanding presented in the Court of Appeals cases cited for support in *Dudewicz*, including the cases to which the Court of Appeals limited the public-policy exception. See *Dudewicz*, 443 Mich at 79-80. For example, in one of those cases, *Ohlsen v DST Industries, Inc*, 111 Mich App 580, 586; 314 NW2d 699 (1981), the Court stated that the public-policy exception "carve[s] out an exception to the general rule that either party may terminate an employment at will for any reason or no reason by providing the discharged employee a remedy *where none is provided under the statute*." (Quotation marks omitted; emphasis added.) The Court held that the plaintiff in that case could not state a claim under the public-policy exception, reasoning that

> retaliatory discharges are expressly prohibited under the [applicable] statute, and, in addition, a remedy is provided to an employee who claims a violation of the statute. Therefore, unlike the plaintiff in [an earlier case applying the public-policy exception], *the plaintiff in the present case has a remedy provided by the statute under which he is suing*.
>
> The [earlier] decision does not extend to this case where the statute involved prohibits retaliatory discharge *and provides an exclusive remedy*. [*Ohlsen*, 111 Mich App at 585-586 (emphasis added; quotation marks omitted).]

Under the proper reading of *Dudewicz*, it is clear that it is generally inapplicable here because the CIAR does not necessarily create an exclusive remedial scheme that preempts applicable common-law claims, if such claims exist. As a comparison, the WPA includes a non-retaliation provision and also a remedial scheme that creates a cause of action for damages or injunctive relief, grants jurisdiction to the appropriate court, enumerates the burden of proof, and expressly provides remedies. MCL 15.363 and 15.364. As discussed in part II of this opinion, I do not think that it is appropriate for this Court to decide now to what extent §§ 1010(F) and 1012(F) of the CIAR affect the availability of any private remedies, so it is unclear at this point whether the CIAR creates a private remedy or whether that remedy could be deemed exclusive. If those questions were properly before a court, and that court determined that the CIAR *does* create a cause of action with private remedies, and further determined that the boards of commissioners intended such remedies to be exclusive, then, under *Dudewicz*, the public-policy exception would not apply. I would further note that there are circumstances under which § 1011 of the CIAR would be preempted by the WPA and in those cases, under *Dudewicz*, the public-policy exception to the general rule of at-will employment would not apply.

B. RESPONSE TO JUSTICE MARKMAN'S PARTIAL CONCURRENCE AND PARTIAL DISSENT

Justice MARKMAN would hold that § 1011 of the CIAR does not fall within the public-policy exception recognized in *Suchodolski* because he "would not extend the *Suchodolski* exceptions beyond the limits of *statewide* public policy," particularly where the local regulation is "more restrictive or burdensome than our default statewide public policy." *Post* at 115. I disagree because I think that, like other validly enacted laws in Michigan, an otherwise valid local law can be part of *Suchodolski*'s public-policy exception.

To begin with, local laws are *part* of the state's law and policies, so it is difficult to evaluate them distinctly from statewide policy. Justice MARKMAN states that "while the regulation does reflect the public policy of the four counties that enacted it, it cannot, in my judgment, be fairly said to reflect the public policy of the state of Michigan." *Post* at 115. But, as a state, Michigan has a policy of delegating authority to county boards of commissioners to act in matters "that relate to county affairs," as long as the local regulations do not contravene statewide law. MCL 46.11(j); see also Const 1963, art 7, § 34.[6] This, in effect, creates a default scheme of interwoven local and state regulation in areas where local legislative bodies are authorized to act. So long as local laws are within the scope of authority delegated to local legislative bodies by the Legislature and otherwise valid, then local laws are part of the state's legal and public-policy framework and reflect the Legislature's choice to enable overlapping state and local regulation of that subject area.[7]

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[6] See part II of this opinion.

[7] Justice MARKMAN argues that it would be bad policy to allow local governments to create non-retaliation provisions because "it is consider-

The Legislature has even more specifically identified public health as an area in which state and local regulation is needed. The Legislature expressly authorized boards of commissioners, in conjunction with local health departments, to adopt standards "at least as stringent as the standard established by state law" in order to regulate as "necessary and appropriate" to carry out the statutory *duties* of the local health departments to "continually and diligently endeavor to prevent disease [and] prolong life." MCL 333.2441(1) and 333.2433(1). As the majority opinion concludes, the CIAR falls within this authority. Therefore, the Legislature has specifically contemplated that there may be a patchwork of regulation across the state in this area.[8]

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ably more burdensome" to employers, "given that all 83 counties could theoretically adopt varying local public policies." *Post* at 115-116. This outcome is the result of the Legislature's decision to permit state and local regulation in this area, however, and it is up to the Legislature to determine whether the benefits of local regulation outweigh the costs of a lack of statewide uniformity. Justice MARKMAN states that this position "fails to consider that the Legislature has already done just that by having indicated that a county is only allowed to enact ordinances that '*do not contravene the general laws of this state*.' " *Post* at 116 n 11, quoting MCL 46.10b. I think that Justice MARKMAN is missing my point. Obviously, he and I have differing views about whether the CIAR contravenes the general laws of the state, but I cannot see how his concern that varying local regulations could be "burdensome" to employers is relevant to that discussion. Regardless of whether the CIAR contravenes the law of the state for a different reason, it does not do so merely by virtue of the fact that it is a local regulation, given that the state has an explicit policy of permitting a patchwork of local regulation in many areas of law.

[8] For this reason, I also disagree with Justice MARKMAN's statement that because the CIAR is more restrictive than the Michigan Clean Indoor Air Act (MCIAA), the CIAR does not "reflect the public policy of the state of Michigan." *Post* at 115. To the extent that the CIAR is more restrictive than the MCIAA, but not preempted by the MCIAA, it reflects the state policy to allow interwoven state and local laws in the area of public health.

In light of the interwoven nature of state and local policies in Michigan, in my judgment, validly enacted local laws are part of *Suchodolski*'s public-policy exception. The purpose of the public-policy exception is to prevent an employer from discharging an employee on a basis that is contrary to public policy. *Suchodolski*, 412 Mich at 695. *Suchodolski* provides that a public policy can be established, at a minimum, by an explicit or implicit legislative policy. See *id*. at 695-696. The CIAR is an explicit legislative policy. *Suchodolski* did not distinguish between statewide and local laws or statewide and local legislative bodies. Instead, *Suchodolski* repeatedly referred to public policies that are "legislative statements," a "legislative expression of policy," and a "legislative enactment," without qualification.[9] *Id*. at 695-696. *Suchodolski* did recognize some limits to the public-policy exception, but none applies where, as here, the policy was enacted by a legislative body and was intended to directly confer rights on employees.[10] I do not think it serves the purposes of the public-policy exception to create another limitation excluding laws enacted by local legislative bodies because, in the counties where the CIAR has been enacted, it is part of the governing law of the region and an employer is bound to

[9] Justice MARKMAN agrees that a county board of commissioners "is a legislative body" and that the CIAR "constitutes the 'law' in the four counties," but nonetheless concludes that the *Suchodolski* public-policy exception was not intended to include laws enacted by county boards because a county board is not "the Legislature" and county laws are not statewide laws. *Post* at 115. But *Suchodolski* does not provide a basis for this distinction. The few cases and statutes to which *Suchodolski* referred did involve laws adopted by the statewide Legislature, but nothing in the opinion indicates that it found that to be significant.

[10] The limits provided in *Suchodolski* were that a public policy cannot be established by the code of ethics of a private association and that a right cannot be inferred from extensive regulation if the regulation is not "directed at conferring rights on the employees." *Suchodolski*, 412 Mich at 696-697.

follow it. It would be contrary to law for an employer to fire an employee on grounds contrary to the CIAR, and it is therefore consistent with the purposes of the public-policy exception to include local laws in the public-policy exception. Therefore, I would not exclude laws enacted by local legislative bodies from the public-policy exception to the general rule of at-will employment.

II. PRIVATE CAUSE OF ACTION

This Court also asked the parties to address whether the boards of commissioners had the authority to adopt §§ 1010(F) and 1012(F) of the CIAR, which create private causes of action.[11] *McNeil*, 482 Mich at 1014-1015. I agree with the majority opinion's conclusion that §§ 1010(F) and 1012(F) are valid because they are within the authority of the boards of commissioners and do not contravene the general laws of the state.

As Justice MARKMAN stated, the Michigan Constitution provides that county boards of commissioners have only those legislative, administrative, and other powers granted to them by law. Const 1963, art 7, § 8. The scope of authority delegated to boards of commissioners by law, however, is very broad. To begin with, the constitution provides that the powers granted to counties by the constitution and by law "shall be liberally construed in their favor" and "shall include those fairly implied and not prohibited by this constitution." Const 1963, art 7, § 34. Further, the Legislature very broadly granted boards of commissioners the power to "pass

[11] Section 1010(F) of the CIAR states that "[n]otwithstanding any other provisions of this regulation, a private citizen may bring legal action to enforce this regulation." Section 1012(F) states that "[n]otwithstanding any other provisions of this regulation, a private citizen may bring legal action to enforce this regulation."

ordinances that relate to county affairs and do not contravene the general laws of this state . . . ." MCL 46.11(j).

In light of article 7, §§ 8 and 34, of the Michigan Constitution and MCL 46.11(j), this Court must address two questions in order to determine whether §§ 1010(F) and 1012(F) of the CIAR are within the powers delegated to boards of commissioners: (1) whether the laws enabling boards of commissioners to enact regulations adopted by local health departments fairly imply the power to create a private right of enforcement and, if so, (2) whether doing so otherwise contravenes the general laws of the state or is prohibited by law.

First, in my judgment, §§ 1010(F) and 1012(F) are within the authority delegated to boards of commissioners because the power to create a private right of action is fairly implied by the relevant law delegating authority to boards of commissioners. The state constitution provides that laws concerning counties should be liberally construed in their favor and shall be construed to include "those [powers] fairly implied and not prohibited by this constitution." Const 1963, art 7, § 34. As noted, the constitution and state statutes give boards of commissioners broad authority to exercise their legislative power by adopting ordinances that relate to county affairs. The power to create a private cause of action is within the legislative power. See *Mintz v Jacob*, 163 Mich 280, 283; 128 NW 211 (1910).[12] Therefore, in my judgment, the power to create a private cause of action is fairly implied from the broad grant of legislative power given to boards of commissioners in this area.

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[12] See also, generally, *Gardner v Wood*, 429 Mich 290, 301; 414 NW2d 706 (1987). I further note that, in Michigan, the ability to create a private cause of action is also within the authority of the courts. *Id.*

Justice MARKMAN argues that we should infer that MCL 46.10b was intended to limit boards of commissioners' power in a manner that would prevent the creation of a private cause of action. As Justice MARKMAN noted, MCL 46.11(j) provides that boards of commissioners may adopt sanctions pursuant to MCL 46.10b for violations of ordinances adopted under MCL 46.11(j).[13] Justice MARKMAN would hold that this limits the ability of boards of commissioners to adopt sanctions not included in MCL 46.10b, at least when boards of commissioners are acting solely under powers authorized in MCL 46.11(j). To the extent that MCL 46.11(j) can be read to limit the authority of boards of commissioners, however, I do not think that §§ 1010(F) and 1012(F) of the CIAR necessarily conflict with this limit given that they do not expressly create any additional penalties beyond those applicable for a violation of the ordinance.[14] Sections 1010(F) and 1012(F) only state that "a private citizen may bring legal action to enforce this regulation"; they do not necessarily limit or enhance the extent to which remedies are available.[15] Therefore,

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[13] The sanctions permitted by § 10b include imprisonment for a period of not more than 90 days or a fine of not more than $500. Notably, the Public Health Code authorizes additional penalties for violation of regulations that, like the CIAR, are also promulgated under the authority of the Public Health Code. See MCL 333.2441(2) and 333.2461.

[14] The penalties that may be imposed for violations of the CIAR are provided in § 1012(B) and (C) of the CIAR.

[15] Notably, the question of whether boards of commissioners could create a private cause of action against a private entity for a private remedy, such as damages, is not before us. The question whether a court could or should imply a cause of action for a private remedy from the CIAR is also not before us. I do not think it is necessary or appropriate for this Court to address these issues today given that the Court concludes that the CIAR is at least facially valid and this is a declaratory action. Although Michigan's court rule permitting declaratory actions, MCR 2.605, should be broadly construed, there are still limitations to the scope of a declaratory action. See *Allstate Ins Co v Hayes*, 442 Mich 56, 65-66;

as the only question currently before this Court is whether the boards of commissioners may create a private cause of action to enforce the CIAR, and not what remedies may be available through the private cause of action, I do not think that MCL 46.10b limits the power of the boards of commissioners to adopt §§ 1010(F) and 1012(F).

Second, I do not think that §§ 1010(F) and 1012(F) of the CIAR contravene the laws of the state. The authority of boards of commissioners to create private rights of action is limited to the extent that doing so would contravene statewide law since, under article 7, § 8, of the state constitution, boards of commissioners only have the powers granted to them by law and, under MCL 46.11(j), they cannot adopt ordinances that are contrary to Michigan's general laws. Justice MARKMAN argues that the provisions of the CIAR creating private causes of action are contrary to the general laws of the state because they are inconsistent with MCL 46.10b and therefore do not fall within *Suchodolski*'s public-policy exception to the common-law at-will employment doctrine. As discussed, I think that §§ 1010(F) and 1012(F) are at least facially valid and thus, at least to the extent this Court is reviewing these sections today, may fall within *Suchodolski*'s public-policy exception and do not necessarily contravene the general laws of the state.

III. CONCLUSION

For the reasons discussed here, I concur with the majority opinion and conclude that the CIAR, including §§ 1010(F), 1011, and 1012(F), should be upheld.

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499 NW2d 743 (1993). I think it is beyond the scope of this declaratory action for the Court to pontificate regarding the remedies available to future private litigants who are not parties to this case.

KELLY, C.J., concurred with CAVANAGH, J.

MARKMAN, J. (*concurring in part and dissenting in part*). This case involves an indoor-air regulation proposed by Northwest Michigan Community Health Agency (NMCHA) (a four-county district health department) that, pursuant to MCL 333.2441(1), became effective after it was approved by the corresponding four county boards of commissioners. The first part of the regulation imposes a broad ban on smoking in public and private workplaces, including business vehicles occupied by more than one person, and requires any business (excluding restaurants) that provides a designated smoking area to do so in a separate enclosed area that is independently ventilated. The second part of the regulation prohibits an employer from taking an adverse employment action against a person who asserts the right to a smoke-free environment, and creates a private right of action by such person against his or her employer.

After this regulation was approved, plaintiff business owners in the affected counties filed an action for declaratory relief, arguing that the NMCHA lacked the authority to enact such a regulation and that the regulation was preempted by the less restrictive Michigan Clean Indoor Air Act, MCL 333.12601 *et seq*. Plaintiffs also argued that the regulation was invalid because it impinged on an employer's common-law right to discharge an at-will employee. Plaintiffs' motion for summary disposition was denied by the trial court, and they appealed.

The Court of Appeals upheld the regulation in a published opinion. *McNeil v Charlevoix Co*, 275 Mich App 686; 741 NW2d 27 (2007). The Court concluded that the NMCHA possessed the authority to adopt the regulation and that the regulation was not preempted

by the Michigan Clean Indoor Air Act. The Court also held that the regulation's restriction on an employer's general right to discharge an at-will employee did not violate Michigan's "at-will" employment doctrine because it fell within exceptions to that doctrine set forth in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982).

We granted leave to appeal and asked the parties to brief

> (1) whether the local health department or the county board of commissioners, the entity vested with final authorization of the regulation, MCL 333.2441(1), can create a right or private cause of action against a private entity that alters Michigan's at-will employment doctrine; (2) whether the right or private cause of action created by Clean Indoor Air Regulation § 1001 [sic: 1011] falls within the exceptions set forth in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692 (1982), to Michigan's at-will employment doctrine; and (3) whether the exceptions to Michigan's employment at-will doctrine set forth in *Suchodolski* on the basis of "public policy" are consistent with this Court's decision in *Terrien v Zwit*, 467 Mich 56 [648 NW2d 602] (2002). [482 Mich 1014 (2008).]

In addition, I separately requested the parties to brief "whether, under relevant legal and constitutional principles, MCL 333.2441(1) properly delegates authority to Charlevoix County and the [NMCHA] to promulgate the regulations at issue in this case." *Id*. at 1015.

Rather than writing an opinion of its own addressing the issues we asked the parties to brief, the majority has adopted the Court of Appeals opinion verbatim (except that the preemption analysis has been excluded). As a result, the majority opinion only peremptorily addresses the first and third issues that we specifically asked the parties to brief in response to the Court of Appeals opinion.

I concur with the majority's conclusion that the four county boards of commissioners acting in conjunction with the NMCHA possessed the authority to adopt that part of the clean indoor air regulation that restricts smoking and that such regulation is not preempted by the Michigan Clean Indoor Air Act. I dissent, however, from the conclusion that the part of the regulation that creates a private cause of action against employers is valid. Rather, I would hold that a county board of commissioners cannot create a private cause of action against a private entity that alters Michigan's at-will employment doctrine. I also dissent from the conclusion that the part of the regulation that restricts smoking fits within one of the *Suchodolski* exceptions to at-will employment. I would not extend the *Suchodolski* exceptions to the at-will employment doctrine to the circumstances of this case.

I. NON-DELEGATION

The parties were asked to brief whether the regulation was enacted pursuant to a proper delegation of legislative authority. As explained in *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 10; 658 NW2d 127 (2003), and *Blue Cross & Blue Shield v Governor*, 422 Mich 1, 51-55; 367 NW2d 1 (1985), the Legislature may not delegate its legislative power to the executive branch. The Legislature may, however, delegate a task to an executive branch agency if it provides "sufficient standards." *Taylor*, *supra* at 10 n 9. Such accompanying standards are essentially viewed as transforming an improper delegation of legislative power into a proper exercise of executive power. See *BCBSM*, *supra* at 51.

The regulation at issue here was adopted pursuant to MCL 333.2441(1), which provides in relevant part:

> A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department. The regulations shall be approved or disapproved by the local governing entity. The regulations shall become effective 45 days after approval by the local health department's governing entity or at a time specified by the local health department's governing entity. The regulations shall be at least as stringent as the standard established by state law applicable to the same or similar subject matter.[1]

Plaintiffs contend that this provision does not include sufficient legislative standards or guidance for the enactment of regulations and thus amounts to an improper delegation of legislative authority. I believe that the non-delegation doctrine is ultimately inapplicable in this case. This is because the provision specifies that "[t]he regulations shall be approved or disapproved by the local governing entity," and the regulation only becomes effective "after approval" by the governing entity. That is, a local health department regulation does not become effective *unless* it is approved by the local governing entity, which in this case is the county boards of commissioners. Thus, the provision contemplates a two-step process: first, the local health department proposes a regulation and, second, the local governing entity approves the regulation. Only then does the regulation take effect. When the elected county boards of commissioners approved this regulation, they were acting pursuant to their *own* legislative powers as the governing entities of their respective local jurisdictions. The non-delegation doctrine does not apply to the proper exercise of legislative power by a legislative body.

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[1] This provision is part of the Public Health Code, as is the Michigan Clean Indoor Air Act. Accordingly, MCL 333.2441(1) authorizes regulations addressing any matter that comes within the Public Health Code and is not limited to smoking regulations.

See *Bendix Safety Restraints Group v City of Troy*, 215 Mich App 289; 544 NW2d 481 (1996), adopting the dissent from *Marposs Corp v City of Troy*, 204 Mich App 156; 514 NW2d 202 (1994) (holding that actions taken by a city council pursuant to a statute do not violate the non-delegation doctrine because a city council exercises legislative, not executive, power). Thus, when the elected and accountable boards of commissioners approved the regulation, notwithstanding that the regulation originated with the unelected and unaccountable health department, they were exercising their own legislative powers and were unaffected by the non-delegation doctrine.

Therefore, I believe that the principal question here is not whether the regulation was enacted pursuant to an improper delegation of legislative authority, but whether the county boards of commissioners, acting in conjunction with the NMCHA, possessed the legislative authority to adopt the regulation.

II. AUTHORITY

Plaintiffs argued below that the NMCHA lacked the authority to adopt the regulation because its smoking restrictions are stricter than those permitted under the Michigan Clean Indoor Air Act.[2] The trial court and the Court of Appeals disagreed, and I concur with those courts' conclusions, although on the basis of a different rationale.

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[2] MCL 333.2441(1) specifically states that a local health department regulation "shall become effective 45 days after approval by the local health department's governing entity . . . ." Given that the regulation would have no effect unless the county boards of commissioners had approved it, we are effectively reviewing a county regulation, notwithstanding the fact that the regulation may have originated in a local health department.

In the course of concluding that the NMCHA and the county boards of commissioners possessed the authority to enact the regulation, the Court of Appeals cited among other things: (1) MCL 333.2433(1), which charges local health departments to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs"; (2) MCL 333.2435(d), which provides that a local health department may "[a]dopt regulations to properly safeguard the public health"; and (3) MCL 333.2441(1), which authorizes the adoption of regulations that "are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department." After additionally noting that MCL 333.1111(2) provides that the Public Health Code is to be "liberally construed for the protection of the health, safety, and welfare of the people of this state," the Court of Appeals concluded that these statutes evinced a legislative intent to permit the instant regulation.

I agree with the Court of Appeals that the boards of commissioners, acting in conjunction with the NMCHA, possessed the authority to adopt the part of the regulation that restricts smoking. MCL 333.2435(d) specifically provides that a local health department may adopt "regulations to properly safeguard the public health . . . ." This provision granted the authority to adopt the part of the clean indoor air regulation that restricts smoking. MCL 333.2441(1) further provides that a local health department "may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department," and protecting the public's health, including through the implementation of an anti-smoking regulation if that is a local health department's determination, would clearly seem to be a responsibility

vested in such departments. And, the regulation is consistent with MCL 333.2433(1), at least to the extent it is designed to "prevent disease, [and] prolong life." The only limitation that the Legislature placed on the promulgation of such a regulation by a local health department, and the corresponding board of commissioners, is that it "be at least as stringent as the standard established by state law applicable to the same or similar subject matter." MCL 333.2441(1). The regulation of smoking here is clearly more stringent than the Michigan Clean Indoor Air Act and thus satisfies this limitation.[3]

III. PRIVATE CAUSE OF ACTION

Section 1011 of the regulation provides that "no person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by the regulation." Section 1010(F) provides that a "private citizen may bring legal action to enforce this regulation." And § 1012(F) provides that "an employee or a private citizen may bring legal action to enforce this regulation." The lower courts implicitly concluded that the private cause of action created by this regulation is valid. I respectfully disagree and would hold

[3] The parties agree that the regulation restricts smoking in a greater range of public and private places than the Michigan Clean Indoor Air Act. For example, the regulation applies to business vehicles occupied by more than one person whereas the state statute does not. The regulation also imposes greater obligations on businesses than the state statute. For example, MCL 333.12605(1) provides that if an owner designates a smoking area, "existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in both smoking and adjacent nonsmoking areas." In contrast, § 1008(6) of the regulation requires a separate enclosed area that is "independently ventilated" if an owner designates a smoking area.

that a county board of commissioners cannot create a private cause of action that is in contravention of Michigan's "at-will" employment doctrine.

The majority concludes that the local health department acting in conjunction with the county board of commissioners can create a right or private cause of action against a private entity that alters Michigan's at-will doctrine. The majority also concludes that the private cause of action created by the regulation is encompassed by the *Suchodolski* exceptions to the at-will doctrine.

"Boards of supervisors shall have legislative, administrative and such other powers and duties as provided by law." Const 1963, art 7, § 8. Local governments, including counties, have no inherent authority to enact laws or to promulgate regulations because they are governments of limited powers acting pursuant to delegated authority. *City of Kalamazoo v Titus*, 208 Mich 252, 262; 175 NW 480 (1919), quoting 1 Cooley, Constitutional Limitations (7th ed), pp 163, 264 ff. A county board of commissioners may not exercise a power not vested in it by statute. *Pittsfield School Dist No 9 v Washtenaw Co Bd of Supervisors*, 341 Mich 388, 398; 67 NW2d 165 (1954). A county can exercise only such authority as is expressly or impliedly granted by a superior level of government, and always subject to such restrictions as are annexed to the grant. *Id.*

The Legislature granted authority in MCL 46.11(j) to county boards of commissioners to

> pass ordinances that relate to county affairs and *do not contravene the general laws of this state* or interfere with the local affairs of a township, city, or village within the limits of the county, and pursuant to section 10b provide suitable sanctions for the violation of those ordinances. [Emphasis added.]

Section 10b, MCL 46.10b, authorizes a county board of commissioners to make a violation of an ordinance an infraction that subjects an offender to imprisonment for not more than 90 days or a fine of not more than $500. A county board of commissioners is also authorized to approve a local health department regulation that is "at least as stringent as the standard established by state law." MCL 333.2441(1).

In my judgment, the part of the regulation that allows an employee to bring a legal action to enforce the regulation is beyond the authority of a county board of commissioners to enact. This is because it contravenes the law of at-will employment in this state. The general rule is that "in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski*, *supra* at 694-695. See also *Rood v Gen Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993).

The instant regulation would limit an employer's ability to terminate an at-will employee by creating a new private cause of action by any employee against his employer for wrongful discharge for asserting a right "afforded by the regulation." Thus, the regulation contravenes the general law of this state, the at-will employment doctrine, and the county boards of commissioners simply do not possess the authority to act in such disregard.[4]

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[4] While MCL 333.2441(1) *does* authorize a county board of commissioners to approve a health department regulation that is "at least as strict as state law," it does *not* at the same time countermand the general limitation in MCL 46.11(j) that a county board may not act in derogation of the general laws of this state in non-health-related areas. The at-will employment doctrine is obviously a fundamental aspect of the employment law of this state. The Legislature did not confer authority upon county boards to enact regulations contrary to Michigan's at-will employ-

Moreover, the fact that MCL 46.10b authorizes a county board to enact an ordinance and to provide for a fine of no more than $500 or imprisonment of no more than 90 days lends further support to the conclusion that the creation of a private cause of action for the violation of an ordinance is beyond the powers of a county board.[5] This is because the express mention of one thing in a statute generally implies the exclusion of similar things. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003). That is, the listing of *allowable* sanctions for the violation of a local

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ment doctrine. Contrary to Justice CAVANAGH's suggestion, *ante* at 94 n 7, I do not contend that the regulation contravenes the general laws of this state merely because it is a local regulation.

The majority briefly discusses *Mack v Detroit*, 467 Mich 186, 189; 649 NW2d 47 (2002), and correctly notes that *Mack* declined to address whether a city can create a private cause of action against a nongovernmental entity. But, *Mack* merely states that it "does not address whether a city can create rights, protect against discrimination, or create a cause of action against a nongovernmental entity." *Id.* at 197 n 12 (emphasis omitted). Such language hardly suggests that a county, in contravention of the laws of this state, can create a new private cause of action against an individual or business.

Similarly, the majority states several times that the county boards in enacting the instant regulation were acting as local "legislative bodies." I agree and have so stated. See, e.g., *infra* at 115 ("a county board . . . is a legislative body"). But the issue here is only whether the anti-retaliation portion of the regulation *exceeds the authority* given to the boards by the Legislature. The majority devotes its efforts to an undisputed point, when there is a disputed point that merits analysis.

[5] Justice CAVANAGH contends in his concurrence that a county board of commissioner's power to create a private right of action is "fairly implied by the relevant law delegating authority to boards of commissioners." *Ante* at 97. I disagree. Counties have no inherent authority, being governments of limited powers. *Pittsfield School Dist No 9*, *supra* at 398. The power to create a private cause of action is not expressly given, and such power is impliedly denied, to counties, as explained earlier, given that they are only expressly allowed to enact ordinances that provide for up to 90 days in a jail and up to a $500 fine.

ordinance implies that non-listed sanctions are *not allowable*. See, e.g., *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 225; 591 NW2d 52 (1998), which invalidated the penalty provisions of a county ordinance because they exceeded the $500 limit set forth in MCL 46.10b(1). Thus, even if the regulation did not contravene the general rule of at-will employment, which I believe it does, I would nonetheless conclude that a county board may not create a private cause of action against a private entity simply because they have not been given the authority to do so.[6]

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[6] Justice CAVANAGH states that §§ 1010(F) and 1012(F) of the regulation "do not necessarily contravene the general laws of this state." *Ante* at 99. He rejects my argument that the limits on sanctions a board of commissioners may adopt found in MCL 46.10b (a fine of no more than $500 or imprisonment of no more than 90 days) imply the absence of authority to create a private cause of action. Justice CAVANAGH asserts that these limitations do not conflict with §§ 1010(F) and 1012(F) because these sections "do not expressly create any additional penalties beyond those applicable for a violation" of the regulation and thus do "not necessarily . . . enhance the extent to which remedies are available." *Ante* at 98. I disagree. Sections 1010(F) and 1012(F) authorize a private party to bring a legal action against a business. Justice CAVANAGH is apparently suggesting that a judge, as a result of such a civil action, would only be able to impose a remedy consistent with MCL 46.10b(1), although this is nowhere made clear in either Justice CAVANAGH's statement or in §§ 1010(F) and 1012(F) themselves. Indeed, given that incarceration of up to 90 days would not even be possible in a civil lawsuit, it is by no means obvious why these regulations could be said to "incorporate" the sanctions of MCL 46.10b(1). Moreover, how clear is it that the trial court would not have available traditional civil remedies under §§ 1010(F) and 1012(F), such as injunctive or equitable relief? There is simply no basis in either the opinion of this Court or in the laws themselves to suggest that what Justice CAVANAGH asserts has any basis whatsoever. Perhaps what is most significant is the reality that a fine under MCL 46.10b(1) would be payable to the *county* while a civil judgment issued under §§ 1010(F) and 1012(F) would be payable to the *plaintiff*. This incentive for private citizens to sue, in combination with the fact that such a lawsuit could be brought by *any* private citizen, or by *many* private citizens, could easily be viewed as creating a substantially more onerous burden on an individual business, and therefore a substantially more effective remedy

IV. *SUCHODOLSKI*

The majority holds that the smoking restriction of the regulation was encompassed within the *Suchodolski* "public policy" exceptions to Michigan's at-will employment doctrine. I reject this conclusion and also would not extend these exceptions to include regulations that do not apply statewide.

In *Suchodolski*, this Court recognized exceptions to the at-will doctrine "based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id*. at 695.[7] The Court cited as the circumstances in which such exceptions would apply those involving: (1) "adverse treatment of employees who act in accordance with a statutory right or duty," (2) an employee's "failure or refusal to violate a law in the course of employment," or (3) an "employee's exercise of a right conferred by a well-established

for a violation of the statute, than the possibility only of being charged with an ordinance violation by a local prosecutor who almost certainly will be burdened by the need to address more serious criminal violations. For this reason, I believe that the authorization of a private lawsuit, *in addition* to the relief provided under MCL 46.10b(1), can fairly be said to expand the available remedies for a violation of the statute and thereby contravene the general laws of this state.

[7] We asked the parties to brief whether the *Suchodolski* exceptions are consistent with this Court's decision in *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002). *Suchodolski* used the following terms to identify public policy: "a statutory right or duty," "a law," and a "well-established legislative enactment." *Suchodolski*, *supra* at 695-696. In *Terrien*, this Court indicated that in determining public policy, the focus of the judiciary must ultimately be on the policies that, in fact, have been adopted by the public through our various legal processes and that are reflected in our state and federal constitutions, our statutes, the common law, and administrative rules and regulations. *Terrien*, *supra* at 67 n 11. I believe the *Suchodolski* exceptions are compatible with *Terrien* because both cases indicate that "public policy" is to be discerned, not in the personal attitudes of judges, but in objective and verifiable sources of the law.

legislative enactment." *Suchodolski*, *supra* at 695-696. Importantly, in *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993),[8] the Court limited

[8] *Dudewicz* was overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589; 734 NW2d 514 (2007). The majority fails adequately to address *Dudewicz*. First, the majority says the non-retaliation portion of the regulation does not violate Michigan's at-will employment doctrine because it fits within the *Suchodolski* exceptions, but then it contradictorily argues that *Dudewicz* is irrelevant because the Whistleblowers Protection Act (WPA) does not negate the authority granted by the Legislature. See *ante* at 86. Under *Dudewicz*, if the regulation is enforceable under the WPA then a *Suchodolski* public policy claim does not exist. While Justice CAVANAGH reads *Dudewicz* differently than I do, he nonetheless recognizes that "there are circumstances under which § 1011 of the [regulation] would be preempted by the WPA and in those cases, under *Dudewicz*, the public-policy exception to the general rule of at-will employment would not apply." *Ante* at 92 n 5.

However, Justice CAVANAGH contends that *Dudewicz* is "generally inapplicable here because the [regulation] does not necessarily create an exclusive remedial scheme that preempts applicable common-law claims, if such claims exist," *ante* at 92 n 5, and that "*Dudewicz* limits the first *Suchodolski* example of a public-policy exception to the at-will employment rule only where a legislative enactment has not only explicitly prohibited the discharge of an employee acting in accordance with a statutory right or duty, but also provided an exclusive remedy for violation of that explicit prohibition," *ante* at 90-91 n 5. Finally, he indicates that he would overrule the Court of Appeals opinion in *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481; 516 NW2d 102 (1994), to the extent it holds otherwise. *Ante* at 91 n 5. I believe that Justice CAVANAGH has misread *Dudewicz*. The key part of that case states:

> In those cases in which Michigan courts have sustained a public policy claim, the statutes involved did not specifically proscribe retaliatory discharge. Where the statutes involved did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. . . . A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to Dudewicz for reporting his fellow employee's illegal activity, his public policy claim is not sustainable. [*Dudewicz*, *supra* at 79-80.]

Section 1011 of the regulation specifically proscribes a retaliatory discharge against an employee if an employee "exercises any right to a

Suchodolski, stating that a public policy claim is only

smoke-free environment afforded by the regulation." Accordingly, under *Dudewicz*, the *Suchodolski* exceptions do not apply because there is no need for a public policy exception if a statute, or, as here, a regulation, prohibits discharge in retaliation for the conduct at issue. While I do not believe those parts of the regulation that create a private cause of action are valid, Justice CAVANAGH and the majority take a different view. If valid, they provide all the remedy that is needed and no cumulative *Suchodolski* exception exists under *Dudewicz*. And, even though I would hold those parts of the regulation prohibiting a retaliatory discharge invalid, it is still possible, indeed likely, that those parts of the regulation promising an employee a smoke-free environment may be enforceable pursuant to the WPA. Finally, Justice CAVANAGH's citation of *Humenny v Genex Corp*, 390 F3d 901 (CA 6, 2004), in support of his claim that *Dudewicz* only limits the first *Suchodolski* exception when the statute (or regulation) provides "an exclusive remedy for violation of that explicit prohibition" is inapt. The actual holding of *Humenny* is that the first issue that must be addressed in considering a public policy claim is whether the plaintiff has identified a well-established legislative enactment that addresses the particular conduct at issue. *Id.* at 907. This is correct. *Humenny* also stated that if the cited statute (or regulation) does not address the particular conduct at issue, there is no need to reach the question whether the statute "provides a remedy to plaintiffs." *Id.* Again, this is correct. And, I note that *Humenny* used the phrase "provides a remedy," not "provides *an exclusive* remedy." There simply is no language in *Humenny* that purports to hold that that *Dudewicz* only limits the first *Suchodolski* exception when the statute (or regulation) provides "an *exclusive* remedy for violation of that explicit prohibition." *Ante* at 90-91 n 5 (emphasis added). To reiterate, *Dudewicz* limits the first *Suchodolski* exception whenever the cited statute (or regulation) provides a remedy of its own. *Dudewicz*, *supra* at 80. This is because a public policy remedy is obviously not needed when the cited statute or regulation provides a remedy of its own. Justice CAVANAGH's citation of *Ohlsen v DST Industries, Inc*, 111 Mich App 580, 586; 314 NW2d 699 (1981), does not support his claim that a cumulative "public policy" claim is allowable where the applicable statute supplies a non-exclusive remedy. While *Ohlsen* observed that the remedy provided by the statute was exclusive, this is a far cry from saying that it would nonetheless have allowed a cumulative public policy claim if the statute had provided for a non-exclusive remedy. Finally, *Dudewicz* noted that remedies provided by a statute for violation of a right having no common-law counterpart are generally exclusive, not cumulative. *Dudewicz*, *supra* at 78. There can be no dispute that the common law did not provide a right to a smoke-free work environment. Thus, the remedies available under §§ 1010(F) and 1012(F) of the regulation are properly character-

sustainable when there is no statutory prohibition against discharge in retaliation for the conduct at issue.[9]

The majority holds that " 'the regulation's restriction of the general right to discharge an employee at will is consistent with the exceptions to that doctrine set forth in *Suchodolski*.' " *Ante* at 79.[10] I disagree for

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ized as exclusive, and even under Justice CAVANAGH's reading of *Dudewicz*, a public policy claim is barred.

[9] See also *Clifford v Cactus Drilling Corp*, 419 Mich 356; 353 NW2d 469 (1984), in which this Court held that a public policy exception claim did not exist where an employer fired an employee for missing work on account of a work-related injury for which workers' compensation benefits had been paid.

[10] Justice CAVANAGH concludes that the regulation fits within the first *Suchodolski* exception, for adverse treatment of employees who act "in accordance with a legally recognized right or duty." *Ante* at 89. However, I would point out that the Court of Appeals in *Vagts*, *supra* at 485, stated that *Dudewicz* "probably eliminated the first of the three grounds identified in *Suchodolski*." As I will discuss later, to the extent the regulation may be enforceable through the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., this is correct. That is, if the WPA prohibits discharge in retaliation for the conduct at issue, *Suchodolski* does not even apply by the terms of *Dudewicz*. See also *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27-28; 477 NW2d 453 (1991), which held that the WPA is the "exclusive remedy" available to an employee terminated for reporting to any public body a violation of any law or regulation of this state, a political subdivision, or the United States. Indeed, I note that Justice CAVANAGH agrees that if the regulation is enforceable through the WPA, a "public policy" claim would not be allowed. *Ante* at 92 n 5. The majority states that the WPA does not negate the authority granted by the Legislature in the Public Health Code. *Ante* at 86. But, I have not argued that it does. Rather, I have argued that the Public Health Code does not countermand the general limitation of MCL 46.11(j) on a county board to act in derogation of the general laws of this state in non-health-related areas. See note 4 of this opinion.

The majority also states that the Legislature has authorized local health departments to enforce part 126 of the Public Health Code and rules promulgated under it by any " 'appropriate action authorized by law.' " *Ante* at 87, quoting MCL 333.12613(2). This is true, but we are

two reasons. First, I would not extend the *Suchodolski* exceptions to include a local regulation that conflicts with our statewide public policy. The *Suchodolski* exceptions refer to a "statutory right or duty," a "law," and "well-established legislative enactment[s]." The instant regulation at issue is not a statute, and it is not a "well-established legislative enactment." Nor is a county board "the Legislature," although it is a legislative body. While the regulation constitutes the "law" in the four counties, it does not constitute the "law" in any other Michigan counties, much less in all the other Michigan counties. Moreover, the public policy reflected in the regulation is stricter than the public policy established by our Legislature in the Michigan Clean Indoor Air Act and that now applies in all other counties. That is, while the regulation does reflect the public policy of the four counties that enacted it, it cannot, in my judgment, be fairly said to reflect the public policy of the state of Michigan. I would not extend the *Suchodolski* exceptions beyond the limits of *statewide* public policy, at the very least where a local regulation is more restrictive or burdensome than our default statewide public policy. It is one thing for a private employer to be legally accountable for a wrongful discharge that violates a statewide public policy as in *Suchodolski*, but it is considerably more burdensome to subject employers to wrongful discharge lawsuits for a termination that arguably only violates a local public policy, given that all

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reviewing a local regulation that allows a *private citizen* to file a lawsuit. Given that county boards are only statutorily authorized to enact ordinances that include a fine of up to $500 and a term in jail of up to 90 days, MCL 46.10b, and the fact that the express mention of one thing in a statute generally implies the exclusion of similar things, a statute authorizing a local health department to enforce a regulation hardly constitutes authority for that department, acting in conjunction with a county board, to authorize a *private citizen*, rather than the health department, to enforce a regulation through a private lawsuit.

83 counties could theoretically adopt varying local public policies.[11] Justice CAVANAGH contends that under *Suchodolski* "there is no reason to differentiate a legally recognized right or duty created by a state statute and a legally recognized right or duty created by local law." *Ante* at 90 n 4. I disagree. Indeed, the use of the modifier "well-established" in *Suchodolski* in describing the kind of "legislative enactment" that would serve as the foundation for its third exception further indicates that *Suchodolski* itself was attempting to draw distinctions between types of legislative enactments, possibly in order to ensure the kind of notice that would be much more effectively communicated to an employer doing business in multiple counties throughout the state by a statewide statute than by a local regulation.[12]

Second, each *Suchodolski* exception requires a valid "statutory right or duty," a "law," or a "well-established legislative enactment" before it is applicable. As previously explained, that part of the regulation that purports to create a private cause of action against private entities is invalid because it exceeds the authority that MCL 46.11(j) grants a county board. Thus, I do not join the majority in its exercise of this Court's common-law

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[11] Justice CAVANAGH contends that "it is up to the Legislature to determine whether the benefits of local regulation outweigh the costs of a lack of statewide uniformity." *Ante* at 94 n 7. However, he fails to consider that the Legislature has already done just that by having indicated that a county is only allowed to enact ordinances that "*do not contravene the general laws of this state*." MCL 46.10b (emphasis added).

[12] *Suchodolski* cited two cases as examples of situations in which a plaintiff had been terminated in violation of a "well established" legislative enactment: *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976), and *Hrab v Hayes-Albion Corp*, 103 Mich App 90; 302 NW2d 606 (1981). Both of these cases involved workers' compensation claims. There are few statutes that are as well established and known to employers as our Worker's Compensation Disability Act, MCL 418.101 *et seq*.

powers to extend the exceptions of *Suchodolski* to local regulations.[13]

Anticipating that this Court might conclude that the private cause of action provisions of the regulation are invalid, defendants point out that the regulation has a severability clause[14] and argue that even if that part of the regulation that restricts an employer's general "at will" authority to discharge an employee is invalid, the remaining part of the regulation that restricts smoking would still be enforceable pursuant to the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., because the regulation comes within the WPA's prohibition against discriminating against an employee for reporting a violation of a regulation promulgated by a political subdivision of the state.

MCL 15.362 provides:

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[13] Const 1963, art 3, § 7, provides: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." As noted in *Placek v Sterling Hts*, 405 Mich 638, 656-657, 275 NW2d 511 (1979), this Court may develop the common law through its decisions. Justice CAVANAGH states that he would not "exclude laws enacted by local legislative bodies from the public-policy exception . . . ." *Ante* at 96. I believe it is more accurate to describe the majority as extending *Suchodolski* to encompass local regulations. Justice CAVANAGH acknowledges that the cases and statutes cited in *Suchodolski* included laws adopted by our Legislature, but claims that nothing in the opinion indicates the Court found that to be significant. *Ante* at 95 n 9. I disagree. *Suchodolski* only identified statewide laws, and that Court's use of the words "well-established legislative enactment[s]" strongly suggests it was concerned with notice issues. This discussion, I believe, fairly communicates that local regulations would rarely be characterized as constituting "well-established legislative enactment[s]" in the same manner as statewide enactments.

[14] Section 1016 of the regulation provides that if any provision, clause, sentence, or paragraph of the regulation shall be held invalid, such invalidity shall not affect the other provisions of the regulation and the provisions of the regulation that are declared invalid shall be severable.

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of *a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state*, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [Emphasis added.]

Defendants argue that the regulation here clearly comes within the language "law or regulation or rule promulgated pursuant to a law of this state, [or] a political subdivision of this state" in the WPA. Thus, defendants contend that the regulation may be enforced by a plaintiff under the WPA. Because this argument was not considered by the trial court or the Court of Appeals, I would remand to the Court of Appeals to consider this issue in the first instance. If defendants are correct that the regulation is enforceable under the WPA, then the *Dudewicz* limitation, to wit, that a public policy claim is only sustainable when there is no applicable statutory prohibition against discharge in retaliation for the conduct at issue, would apply because the WPA would constitute an applicable statutory prohibition against discharge in retaliation for the conduct at issue.

Finally, to the extent that plaintiffs' arguments suggest that the part of the regulation that restricts smoking more stringently than the Michigan Clean Indoor Air Act is "unwise" and results in "bad policy," these concerns must be addressed to the Legislature or the county boards of commissioners. *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). See also

Halloran v Bhan, 470 Mich 572, 579; 683 NW2d 129 (2004). Plaintiffs, of course, are also free to pursue remedies through the electoral and political processes.[15]

V. CONCLUSION

I agree with the majority that the NMCHA, acting in conjunction with the local boards of commissioners, possesses the authority to enact that part of the regulation that restricts smoking "at least as stringently" as the Michigan Clean Indoor Air Act, and this regulation is not preempted by the Michigan Clean Indoor Air Act. I dissent, however, from the majority's implicit ruling that the part of the regulation that creates a private cause of action against private employers is valid. I would hold instead that MCL 46.11(j) precludes a county board of commissioners from creating a private cause of action against a private entity that alters Michigan's "at-will" employment doctrine. I also dissent from the conclusion that the part of the regulation that restricts smoking fits within one of the *Suchodolski* exceptions to "at-will" employment, and I would not extend the *Suchodolski* exceptions to include local regulations, at the very least where such regulations conflict with statewide public policy. Finally, I would remand to the Court of Appeals to consider in the first instance whether an employee could file a cause of action under the WPA to enforce his or her rights under the part of the regulation that restricts smoking.

CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

[15] Indeed, we are advised that Charlevoix County, though it did not formally withdraw its ratification of the regulation, recently decided *not* to enforce the regulation. I do not know for certain, but I presume, that some or much of the impetus for this decision was a function of political and other related activities in that county.

PEOPLE v McGRAW

Docket No. 132876. Argued May 5, 2009 (Calendar No. 2). Decided July 28, 2009.

Matthew L. McGraw pleaded guilty in the Saginaw Circuit Court to three counts of breaking and entering a building with intent to commit larceny. At sentencing, the court, Leopold P. Borrello, J., assessed 10 points for offense variable (OV) 9 (number of victims), MCL 777.39, for one of the convictions after concluding that the defendant had placed at least two victims in danger when he fled the police after breaking into an unoccupied store. Those points resulted in a higher recommended minimum sentence range under the sentencing guidelines and the imposition of a minimum sentence within that higher range. The defendant applied for leave to appeal, which the Court of Appeals denied in an unpublished order, entered September 24, 2004 (Docket No. 255864). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 473 Mich 877 (2005). The Court of Appeals, WHITBECK, C.J., and SAAD and SCHUETTE, JJ., affirmed in an unpublished opinion per curiam, issued November 16, 2006 (Docket No. 264052). The Court of Appeals concluded that assessing 10 points under OV 9 was proper because the defendant's conduct in fleeing after the breaking and entering had been completed placed two or more persons in danger of injury during the criminal transaction. The Supreme Court granted the defendant leave to appeal. 483 Mich 876 (2009).

In an opinion by Chief Justice KELLY, joined by Justices CAVANAGH, MARKMAN, and HATHAWAY, the Supreme Court *held*:

Offense variables are properly scored by reference only to the sentencing offense unless a particular offense variable statute specifically provides otherwise. In this case, breaking and entering the building was the sentencing offense. The statute for OV 9 does not provide for consideration of conduct that occurred after the completion of the sentencing offense. The sentencing court erred by considering the entire criminal transaction and using the defendant's flight from the police after he completed the sentencing offense when it scored the offense variable. Considering only the defendant's conduct involved in breaking and entering an unoccupied building, the sentencing court should have assessed zero points for OV 9 because no one was placed in danger.

Reversed and remanded.

Justice CORRIGAN, joined by Justices WEAVER and YOUNG, dissenting, would hold that the defendant waived his challenge to the scoring of OV 9 when his attorney stated at sentencing that the guidelines minimum sentence ranges for his offenses "appear to be correct." The defendant's counsel did not provide ineffective assistance of counsel by doing so because the caselaw in effect at the time of sentencing and the record both supported assessing 10 points for OV 9. The rule established by the majority opinion artificially limits, for purposes of sentencing, the duration of an offense to the time necessary to complete the elements defining the offense and disregards the well-established res gestae principle that considers the entire transaction or uninterrupted chain of events surrounding the commission of an offense.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — SCORING OFFENSE VARIABLES.

Offense variables under the sentencing guidelines must be scored by reference only to the offense for which the defendant is being sentenced unless an offense variable statute specifically provides otherwise and allows consideration of conduct beyond the sentencing offense (MCL 777.1 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Randy L. Price*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Anne Yantus* and *Kim M. McGinnis*) for the defendant.

Amicus Curiae:

Brian A. Peppler and *Timothy K. Morris* for the Prosecuting Attorneys Association of Michigan.

KELLY, C.J. This case involves further analysis of the issue presented in *People v Sargent*.[1] There we held that offense variable (OV) 9 in the sentencing guidelines[2]

[1] *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008).

[2] MCL 777.1 *et seq*.

cannot be scored using uncharged acts that did not occur during the same criminal transaction as the sentencing offense. Today we decide whether the offense variables should be scored solely on the basis of conduct occurring during the sentencing offense[3] or also using conduct occurring afterward.

We hold that a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise. Therefore, in this case, defendant's flight from the police after breaking and entering a building was not a permissible basis for scoring OV 9. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for resentencing.

FACTS AND PROCEDURE

Defendant broke into a general store in Marion Township on June 28, 2002, broke into an audio store on July 20, 2002, and then broke into the same general store again on January 5, 2003. No one was in the stores during the break-ins. During the January 5 incident, a witness called the police after seeing defendant and two accomplices loading stolen goods into a car. After defendant and his accomplices left the scene of the crime, a police officer saw the getaway car traveling on the road and pursued it. The chase ended when the vehicle entered a yard and crashed into a chain-link fence. The occupants fled on foot, but defendant was captured.

Defendant pleaded guilty to three counts of breaking and entering a building with intent to commit larceny[4]

[3] The sentencing offense is the crime of which the defendant has been convicted and for which he or she is being sentenced.

[4] MCL 750.110.

in exchange for the dismissal of other charges, including fleeing and eluding the police.[5] In scoring the offense variables, the sentencing court assessed 10 points under OV 9 because it found that defendant had placed at least two victims in danger. The court stated that it would sentence defendant within the guidelines recommendation and imposed concurrent prison terms of 9 to 30 years, 6 to 30 years, and 6 to 30 years. The 9-year sentence resulted from the assessment of 10 points under OV 9 for fleeing from the police after the January 5 break-in.[6]

Defendant's timely request for the appointment of appellate counsel was denied, as was his timely pro se motion for resentencing challenging the scoring of OV 9. The Court of Appeals denied defendant's pro se application for leave to appeal for lack of merit, but this Court remanded the case to the Court of Appeals for consideration as on leave granted.[7]

The Court of Appeals affirmed defendant's conviction, concluding that the record supported the assessment of 10 points under OV 9 because there were two to nine victims.[8] We granted defendant's application for leave to appeal.[9]

THE PROPER APPROACH TO SCORING OFFENSE VARIABLES

The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.* involve legal questions that this Court reviews de novo.[10]

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[5] MCL 750.479a(3).

[6] Had no points been assessed under OV 9, the guidelines minimum sentence range would have been 19 to 76 months, and defendant's 9-year sentence would have exceeded the recommended sentencing range.

[7] *People v McGraw*, 473 Mich 877 (2005).

[8] *People v McGraw*, unpublished opinion per curiam, issued November 16, 2006 (Docket No. 264052); 2006 WL 3334585.

[9] *People v McGraw*, 483 Mich 876 (2009).

[10] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

We are called on to provide further detail delineating the scope of conduct that sentencing courts should consider when scoring the offense variables of the statutory sentencing guidelines. Defendant argues that the variables are to be scored using an offense-specific approach. Under this approach, only conduct occurring during the offense of which the defendant was convicted may be considered. The prosecution, on the other hand, argues that the guidelines must be scored using a transactional approach. Under this approach, a continuum of the defendant's conduct is examined, which can extend far beyond the acts that satisfy the elements of the sentencing offense.

In analyzing this scoring issue, we read the statutory provision for OV 9 in the context of the entire statute "so as to produce, if possible, a harmonious and consistent enactment as a whole."[11] The fair and natural import of the provision governs, considering the subject matter of the entire statute.[12]

We addressed what conduct the sentencing court should consider in *People v Sargent*.[13] We explained that "the offense variables are generally offense-specific. The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense."[14] We stated that usually "only conduct 'relating to the offense' may be taken into consideration when scoring the offense variables."[15]

Our determination about how offense variables should be scored was based on a reading of the senten-

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[11] *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922).

[12] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[13] *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008).

[14] *Id.* at 348.

[15] *Id.* at 349.

cing guidelines statutes as a whole. We relied on the Legislature's use of the terms "the offense" and "each offense" in MCL 777.21:

> MCL 777.21 instructs us on how to score the sentencing guidelines. MCL 777.21(1)(a) instructs us to "[f]ind the offense category for *the offense* . . . [and] determine the offense variables to be scored for that offense category . . . ." (Emphasis added.) MCL 777.21(2) instructs us to "score *each offense*" if "the defendant was convicted of multiple offenses . . . ." (Emphasis added.) MCL 777.21(3), which pertains to habitual offenders, instructs us to "determine the . . . offense variable level . . . based on *the underlying offense*" and then to increase the upper limit of the recommended minimum sentence range as indicated. (Emphasis added.) This language indicates that the offense variables are generally offense specific.[16]

We found it telling in *Sargent* that the individual offense variables presume that the sentencing offense is the reference point for scoring purposes. This is because only when conduct occurring after commission of the sentencing offense is to be considered in scoring do the variables spell out the scope of that conduct:

> That the general rule is that the relevant factors are those relating to the offense being scored is further supported by the fact that the statutes for some offense variables specifically provide otherwise. For instance, MCL 777.44(2)(a) provides that when scoring OV 14 (whether the offender was a leader in a multiple-offender situation), "the entire criminal transaction should be considered . . . ." For other offense variables, the Legislature unambiguously made it known when behavior outside the offense being scored is to be taken into account. OV 12 (contemporaneous felonious acts), for example, applies to acts that occurred within 24 hours of the sentencing offense and have not resulted in separate convictions. MCL 777.42(2)(a). OV 13 (continuing pattern of criminal behavior) explicitly

[16] *Id.* at 348.

> permits scoring for "all crimes within a 5-year period, including the sentencing offense," regardless of whether they resulted in convictions. MCL 777.43(2)(a). OV 16 (property obtained, damaged, lost, or destroyed) provides that in "multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.46(2)(a). Finally, OV 8 (asportation or captivity of victim) specifically focuses on conduct "beyond the time necessary to commit the offense." MCL 777.38(1)(a). That the Legislature has explicitly stated that conduct not related to the offense being scored can be considered when scoring some offense variables strengthens our conclusion that, unless stated otherwise, only conduct that relates to the offense being scored may be considered.[17]

As we explained in *Sargent*, it is telling that the Legislature included language in particular variables explicitly instructing the sentencing court to consider factors or conduct beyond the sentencing offense itself; however, it included no such language in other variables, such as OV 9. If the Legislature had intended a court scoring the sentencing guidelines to use a transactional approach, much of the language in some of the offense variables would have been surplusage. In interpreting a statute, we avoid a construction that would render part of the statute surplusage or nugatory.[18]

If we read the sentencing guidelines as offense-specific by default, the language defining the scope of

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[17] *Id.* at 349-350. Although *Sargent* held that the Legislature intended an offense-specific view to scoring the offense variables, we did not definitively answer the question whether transactional conduct may be considered. It was not necessary to reach that question to resolve the case because it was clear that the defendant's conduct did not occur during the same criminal transaction. The conduct in question was remote from the sentencing offense. *Id.* at 350-351.

[18] *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

conduct for particular offense variables is not surplusage. For example, points are assessed under OV 14 if the offender was a leader in a multiple-offender situation. The statute provides that the "entire criminal transaction should be considered" when scoring this offense variable.[19] When we acknowledge that the default procedure is to score the offense variables using an offense-specific approach, the instruction for OV 14 takes on significance. It requires OV 14 to be scored differently from most. Points must be assessed for conduct extending beyond the sentencing offense. The Legislature's wording of the offense variable statutes implies a default rule that the variables are to be scored considering the sentencing offense alone. It is only when conduct beyond the sentencing offense is to be considered that the variables address the scope of that conduct.

Furthermore, the sentencing guidelines set forth a comprehensive, detailed scheme for scoring. Every offense to which the guidelines apply is listed in a rather voluminous part 2, comprising MCL 777.11 through 777.19.[20] When providing rules for guidelines scoring, the Legislature took pains to set forth step-by-step instructions, pointing with particularity to where one must look to make the necessary calculations. Given the Legislature's attention to detail, we do not believe that it intended to deviate from what otherwise appears to be an offense-specific orientation. If assessing points for conduct beyond the sentencing offense were to be the norm, the Legislature would have delineated the scope of that conduct, as it did with several specific offense variables.[21]

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[19] MCL 777.44(2)(a).

[20] See MCL 777.21(1).

[21] The dissent claims that we fail to explain on what authority we limit the scoring for offense variables to the sentencing offense. It was the

The prosecution argues that our decision in *People v Morson*[22] reflected our belief that the Legislature intended sentencing courts to consider a defendant's entire criminal transaction when scoring the variables. We disagree. We never held in *Morson* that conduct beyond the sentencing offense can be a basis for scoring OV 9. There, 10 points were assessed under OV 9 because the defendant endangered two victims; the sentencing offense was armed robbery.[23] The defendant's accomplice robbed a woman of her purse at gunpoint.[24] The sentencing court concluded that there were two "victims" for purposes of OV 9: the woman who was robbed and another man standing nearby who was shot by the perpetrator.[25]

We concluded that the sentencing court did not err by finding that the person near the woman when the perpetrator stole her purse was "placed in danger of injury or loss of life" by the armed robbery.[26] Therefore, he was a victim under OV 9.[27]

Legislature, not we, that drafted and enacted the detailed and complex sentencing scheme. It was the Legislature that chose to limit the scoring for offense variables to the sentencing offense. The dissent loses sight of the most important piece of the puzzle: the statute. Instead, it turns to res gestae and Court of Appeals decisions to support its position, one of which did not even involve the statutory sentencing guidelines, but instead involved the old judicial sentencing guidelines. See *People v Chesebro*, 206 Mich App 468; 522 NW2d 677 (1994). Furthermore, the dissent rests its res gestae argument on *People v Gillis*, 474 Mich 105; 712 NW2d 419 (2006), which interpreted the felony-murder statute, quite a different statute from the sentencing guidelines statute. When the smoke from the dissent clears, one can see that its arguments are far from the mark.

[22] *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004).

[23] *Id.* at 254.

[24] *Id.* at 253.

[25] *Id.* at 253, 261.

[26] See MCL 777.39(2)(a), as added by 1998 PA 317, which is also the version of the statute applicable in this case.

[27] *Id.* at 262.

Our decision in *Morson* did not delineate the scope of conduct to be considered in scoring offense variables.[28] It simply held that the sentencing court did not err in scoring OV 9 under the particular facts of that case. As we explained in *Sargent*, "in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life."[29] That is precisely what this Court held had happened in *Morson*.

Reading the provisions of MCL 777.1 *et seq*. in harmony suggests that the offense variables are scored by reference only to the sentencing offense, except where specifically provided otherwise.

This does not mean that transactional conduct may never influence a defendant's sentence. Such a result would frustrate the Legislature's intention of having the guidelines promote uniformity in sentencing. Nothing precludes the sentencing court from considering transactional conduct when deciding what sentence to impose within the appropriate guidelines range and whether to depart from the guidelines recommendation. As this Court explained in *People v Babcock*,

> in considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. In other words, if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the

[28] *Morson* explicitly avoided this question because there were three competing views advocated by three concurring and dissenting justices.

[29] *Sargent*, 481 Mich at 351 n 2.

seriousness of his criminal history, the trial court should depart from the guidelines. [30]

In addition, of course, the prosecution is always free to charge a defendant with multiple offenses if they exist, rather than a single offense. The defendant then would be sentenced for all offenses for which a conviction was obtained.[31] Our decision today "not only respects the defendant's right to be sentenced on the basis of law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends."[32]

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[30] *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). This Court has further recognized that conduct beyond the sentencing offense can be considered for purposes of departing from the guidelines. See, for example, *People v Price*, 477 Mich 1; 723 NW2d 201 (2006). *Price* observed that, although foreign convictions cannot be considered under prior record variable 1, and prior offenses not occurring within five years of the sentencing offense cannot be considered under OV 13, "they can, under appropriate circumstances, give rise to a substantial and compelling reason to justify a departure from the guidelines range . . . ." *Id*. at 5 & n 3 The dissent's "sky is falling" prophecy for the sentencing scheme is unfounded; contrary to the dissent's contention, *post* at 154, our reasoning is, in fact, supported "by the law of this state." Also contrary to the dissent's contention, *post* at 154, we are not suggesting that "sentencing courts should depart freely from the guidelines . . . ." To the contrary, we are suggesting that a subsequent criminal offense may rise to the level of a substantial and compelling reason that justifies a departure from the sentencing guidelines. To the extent that it does, consistently with *Babcock* and *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008), it can certainly be taken into consideration by the sentencing court.

[31] Therefore, with regard to the dissent's hypothetical examples, *post* at 137, the prosecution could charge the defendant with the subsequently committed offenses. The defendant could be charged for felonious assault, MCL 750.82, in the first hypothetical and mutilation of a dead body, MCL 750.160, in the second. Alternatively, the sentencing court could consider the subsequently committed offenses and the aggravating circumstances at sentencing. For example, it could consider the defendant's sending the photographs to the victim's family in determining what sentence within the guidelines range to impose or whether to depart from the guidelines recommendation.

[32] *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

THE PROPER SCORING OF OV 9 IN THIS CASE

A defendant is entitled to be sentenced according to accurately scored guidelines and on the basis of accurate information.[33] A sentence is invalid when a sentencing court relies on an inappropriate guidelines range.[34] "[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand."[35] However, in this case, the issue was raised in a motion for resentencing.[36]

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[33] *Id.* at 88-89.

[34] *Id.* at 89.

[35] *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004).

[36] The dissent contends that the defendant waived any sentencing error. However, this theory was never raised by the prosecution. Failure to brief an issue on appeal constitutes abandonment. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). "[A] party is bound to the theory on which the cause was prosecuted or defended in the court below." *Gross v Gen Motors Corp*, 448 Mich 147, 162 n 8; 528 NW2d 707 (1995); see also *Dwelley v Tom McDonnell, Inc*, 334 Mich 229, 233; 54 NW2d 217 (1952). Because the prosecution failed to raise the issue of defendant's waiver, we need not consider it. Because we simply do not consider the prosecution's waiver argument, contrary to the dissent's contention, *post* at 138, we do not "creat[e] a new 'revival of waived errors' rule . . . ." That is, we do not conclude that defendant's filing of a motion for resentencing would "revive" an issue that the defendant had, indeed, already expressly waived. We are also not suggesting that the prosecution's failure to raise an issue constitutes a "confession of substantive error," *post* at 140-141. Thus, we are not by any stretch of the imagination overruling *People v Smith*, 439 Mich 954 (1992), and we are not creating any "automatic rule of reversal," *post* at 141. In addition, contrary to the dissent's assertion, *post* at 139, we do not contend that an appellee is required to file a cross-appeal to raise a waiver argument. We simply conclude that an appellee should at some point actually *raise* the waiver argument. And if he or she does not do so, this Court may, although it is not required to, choose not to raise and address the argument on its own. This is hardly a "novel view." See, e.g., *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989), which refused to address the prosecution's waiver

The sentencing court assessed 10 points under OV 9 for defendant's breaking and entering conviction resulting from the January 5, 2003, offense. This means that it determined there were two to nine victims.[37] At the time of defendant's offense, OV 9 instructed the court to "[c]ount each person who was placed in danger of injury or loss of life as a victim."[38]

The Court of Appeals concluded that assessing 10 points under OV 9 was proper because of defendant's conduct after the breaking and entering had been completed. Specifically, the Court of Appeals upheld the OV 9 score because "in leaving the scene of the crime, defendant was pursued by a police officer for whom he had failed to stop.[39] He ultimately crashed his car,[40]

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argument because the "prosecutor did not raise the waiver issue . . . until he filed his brief in this Court," and *People v Oliver*, 417 Mich 366, 386 n 17; 338 NW2d 167 (1983), which refused to address the prosecution's harmless error argument because the prosecution failed to raise this issue below. Indeed, the dissent's view that whether a defendant has waived an issue "must be" considered by an appellate court, even if the prosecution has not raised waiver, is subject to question. Notably, the dissent cites only a short order of this Court in support of this proposition. *Smith*, 439 Mich at 954. But in *Smith*, this Court took issue with the Court of Appeals holding that failure to file a responsive brief "constitutes a confession of error." See *People v Smith*, 190 Mich App 352, 356; 475 NW2d 875 (1991), vacated in part 439 Mich 954 (1992). In the present case, the waiver issue was not only never raised below, it was never raised before us. Finally, to answer the dissent's question, see *post* at 139, defendant had no reason to make the argument that the prosecution failed to raise the waiver issue. The prosecution never raised the waiver issue in the first place; it is only this Court in a dissent that has raised it. Because the prosecution failed to raise the waiver issue, there is no need for us to address whether defendant's counsel was ineffective.

[37] MCL 777.39(1)(c).

[38] MCL 777.39(2)(a). The statute was amended in 2006 to include property loss as well. However, this amendment has no effect on this case.

[39] The record indicated that defendant was not pursued from the scene of the crime. The police officer spotted the getaway vehicle on the road away from the crime site.

[40] From the record, it is unclear if defendant was the driver or merely a passenger.

and he and the two other occupants ran off."[41] The Court decided that defendant's postoffense conduct supported the scoring of OV 9 because "two or more persons were placed in danger of injury *during the criminal transaction*."[42]

We conclude that the Court of Appeals erred by considering the entire criminal transaction and using defendant's conduct after the crime was completed as the basis for scoring OV 9. Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable.[43] OV 9 does not provide for consideration of

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[41] *McGraw*, unpub op at 2-3; 2006 WL 3334585, at *2.

[42] *Id.* at 3; 2006 WL 3334585, at *2 (emphasis added). The Court of Appeals' opinion assumed that defendant was the driver of the vehicle and that an accomplice to a crime is a "victim" under OV 9. It relied on *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003), and *Chesebro* for the proposition that conduct beyond the sentencing offense can be used to score the offense variables. *Chesebro* involved the judicial sentencing guidelines, not the statutory sentencing guidelines that we interpret today. Furthermore, both of those cases were decided without the benefit of our decisions in *Sargent* and *Morson*. They are overruled insofar as they stand for the proposition that offense variables can be scored using conduct beyond the sentencing offense.

[43] MCL 769.31 provides a set of definitions for use "in this section and [MCL 769.34]," which deals with sentencing departures. MCL 769.31(d) provides:

> "Offense characteristics" means the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate. For purposes of this subdivision, an offense described in section 33b of the corrections code of 1953, 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered as an aggravating factor.

The dissent argues that MCL 769.31(d) permits a sentencing court to consider offenses that are not listed in MCL 791.233b or that did not result in a conviction. This is inconsistent with the well-established legal doctrine

conduct after completion of the sentencing offense. Therefore, it must be scored in this case solely on the basis of defendant's conduct during the breaking and entering. If the prosecution had wanted defendant to be punished for fleeing and eluding, it should not have dismissed the fleeing and eluding charge. It would be fundamentally unfair to allow the prosecution to drop the fleeing and eluding charge while brokering a plea bargain, then resurrect it at sentencing in another form.

When we consider only the breaking and entering, it is apparent that no one was placed in danger of injury or loss of life. No one was present in the general store or anywhere near the defendant when he broke into the building.[44] Even under the current version of OV 9,

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expressio unius est exclusio alterius ("the expression of one thing is the exclusion of another"). *Miller v Allstate Ins Co*, 481 Mich 601, 611; 751 NW2d 463 (2008).

> Th[is] maxim is a rule of construction that is a product of logic and common sense. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, at 203. This Court long ago stated that no maxim is more uniformly used to properly construe statutes. [*Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74-75; 711 NW2d 340 (2006).]

Even assuming that MCL 769.31(d) applies to scoring offense variables because it states that offenses listed in MCL 791.233b that resulted in a conviction can be considered, the dissent's argument fails. This is because the natural implication of that assumption is that offenses not listed or that did not result in a conviction cannot be considered. In any event, we need not decide whether a sentencing court can consider listed offenses resulting in conviction that arose out of the same transaction as the sentencing offense. This is because fleeing and eluding is not a listed offense, and defendant was never convicted of fleeing and eluding. Consequently, contrary to what the dissent asserts, *post* at 152, there is no need for us to decide whether defendant's fleeing and eluding constituted an "aggravating . . . factor[] relating to the offense" under MCL 769.31(d).

[44] Cf. *Morson*, 471 Mich at 262-263, which held that there were two "victims" under OV 9 when two people were present at the scene of the sentencing offense and were placed in danger.

which allows consideration of property loss, the owner of the general store would be the only victim. Defendant's flight from the police occurred after the offense was completed for purposes of scoring the sentencing guidelines; hence, it cannot be considered in scoring OV 9.[45] Defendant did not place two to nine victims in danger of injury or loss of life. Therefore, no points should have been assessed for OV 9.[46]

CONCLUSION

Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise. The language of the statute for OV 9 does not so provide.

In this case, the sentencing court scored OV 9 by including defendant's conduct in fleeing from the police after his offense of breaking into and entering an unoccupied building was completed. His flight from the police should not have been used in scoring OV 9. The sentencing court should have assessed zero points for OV 9 because no one was placed in danger during the breaking and entering.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the circuit court for resentencing.

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[45] There is no need for us to determine precisely when the breaking and entering offense was completed for purposes of scoring the sentencing guidelines in this case; it is clear that defendant's flight from the police and the subsequent events involved here were far beyond and removed from the sentencing offense.

[46] Defendant also argues that OV 9 was improperly scored at 10 points because (1) accomplices to the sentencing crime are not "victims" for purposes of scoring OV 9 and (2) there was insufficient evidence that he was the driver of the vehicle that fled the police and crashed into the chain-link fence. We need not address these issues because they pertain to conduct committed after the breaking and entering was completed and for which defendant cannot have points assessed under OV 9.

CAVANAGH, MARKMAN, and HATHAWAY, JJ., concurred with KELLY, C.J.

CORRIGAN, J. (*dissenting*). The majority holds that the sentencing court erred by scoring 10 points for offense variable (OV) 9 (number of victims), MCL 777.39, because the collision of defendant's getaway vehicle into a fence during a police chase occurred after the definitional elements of his offense, breaking and entering a building with intent to commit larceny, MCL 750.110, were completed. The majority thus reverses the judgment of the Court of Appeals and remands the case for resentencing.

I respectfully dissent for three reasons:

(1) Defendant waived his challenge to the scoring of OV 9 when his attorney stated at sentencing that the guidelines minimum sentence ranges for his offenses "appear to be correct."

(2) Defense counsel was not ineffective in agreeing with the guidelines calculations because the caselaw in effect at the time of sentencing supported the OV 9 score.

(3) In any event, the sentencing court did not err in scoring OV 9. The record supported the court's finding that two persons were placed in danger of injury when defendant's getaway vehicle crashed into a fence. In prohibiting consideration of defendant's escape attempt, the majority invents a new "elements-only" test for scoring the offense variables. This new rule artificially confines the duration of an offense to its definitional elements for the purpose of sentencing. This unprecedented approach to scoring the sentencing guidelines disregards the well-established res gestae principle that looks to the entire transaction or uninterrupted chain of events surrounding the commission of an offense.

The practical consequences of this new rule should not be underestimated. The majority today severely impairs the ability of sentencing courts to assess the seriousness of an offense when scoring the offense variables. No longer will a court ever be able to consider aggravating facts and circumstances that occur after the elements of the offense have been met.

Consider, for example, a defendant who breaks into a woman's home, rapes her, and then, immediately after the rape, severely beats her and threatens her with a knife he found in her home. The defendant is convicted of first-degree criminal sexual conduct. Under today's decision, the defendant cannot be assessed any points under OV 1, MCL 777.31, for his use of the knife, under OV 3, MCL 777.33, for the injuries that the victim suffered during the beating, or under OV 7, MCL 777.37, for the aggravated physical abuse of the victim because all these actions, while part of the same criminal event as the rape, occurred after the rape was completed.

Or to take another example, suppose a defendant kills a young woman, dismembers her body, and then, three days later, sends photographs of the dismembered body parts to the victim's parents, which requires them to undergo psychological counseling as a result of seeing the photographs. The defendant is convicted of first-degree murder. Under the majority's new elements-only rule, the court cannot assess any points under OV 5, MCL 777.35, for the parents' serious psychological injuries because the elements of first-degree murder were completed before the defendant dismembered the body and sent the photographs to the parents. The majority's new rule will thus prevent courts from assessing the true seriousness of an offense when scoring the guidelines to determine the appropriate minimum sentence.

I. WAIVER

Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). It differs from forfeiture, which is the failure to timely assert a right. *Id*. A waiver extinguishes the alleged error, thus foreclosing appellate review. *Id*. at 215, 219. In *Carter*, we held that no reviewable error existed because defense counsel had "clearly expressed satisfaction with the trial court's decision to refuse the jury's request [to rehear testimony] and its subsequent instruction." *Id*. at 219.

Here, the court asked defense counsel at sentencing if he had received the sentencing information report indicating a guidelines minimum sentence range of 29 to 114 months. Defense counsel responded, "Yes, Judge, and they appear to be correct." Defendant did not take issue with counsel's statement. Thus, the record reflects that the defense expressed satisfaction with the guidelines range, the calculation of which included the scoring of OV 9 that defendant now challenges on appeal. Because the issue has been waived, the alleged error is extinguished, foreclosing appellate review. *Id.* at 215, 219.

The majority's reliance on defendant's motion for resentencing as a basis to review the alleged error reflects a misunderstanding of the distinction between waiver and forfeiture. Although a motion for resentencing may preserve a claim and thus avoid forfeiture, defendant here had already waived the alleged error at sentencing, thus extinguishing it *before the motion for resentencing was filed*. We have never held that an extinguished error could be revived in the manner suggested by the majority; indeed, creating a new "revival of waived errors" rule would significantly erode the distinction between waiver and forfeiture explained in *Carter*.

The majority also errs by stating that "[b]ecause the prosecution failed to raise the issue of defendant's waiver, we need not consider it." *Ante* at 131 n 36. An appellee is not required to file a cross-appeal raising the issue of forfeiture or waiver. On the contrary, an appellant's argument on each issue must include a statement of the applicable standard or standards of review. MCR 7.212(C)(7); MCR 7.306(A). A defendant's waiver or forfeiture of an issue will affect the availability of or the standard of review for that issue. Thus, preservation, including forfeiture and waiver, is a threshold question that inheres in every issue raised on appeal and must be considered by an appellate court. The majority's novel view that an appellee must file a cross-appeal to challenge the preservation of an issue thus lacks any basis in our court rules or caselaw, and it would increase dramatically the number of criminal appeals filed in our court system.

Moreover, if, under today's decision, an appellee is now required to raise the argument that the appellant waived a substantive issue, then is the appellant required to raise the argument that the appellee waived the waiver issue? The majority's decision essentially creates a potentially infinite spiral of waivers with no logical stopping point. What principle guides the majority in choosing to end this spiral at the point where the appellee but not the appellant is responsible for raising the issue? It is, after all, by definition the appellant who generally advances issues on appeal. The majority's arbitrary and unexplained assignment of responsibility to the appellee distorts the usual appellate burden and is most troubling.

Nor is it clear how the majority can avoid addressing whether the substantive issue was waived if, as we held in *Carter*, a waived error is extinguished. The truly

illogical nature of the majority's action should not go unmentioned: the majority reverses the judgment of sentence on the basis of an "error" while refusing even to consider whether that "error" was extinguished. How can the majority reverse because of an error while dodging the question whether that very error even *exists*?

Further, the majority cites *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959), for the proposition that the "[f]ailure to brief an issue on appeal constitutes abandonment." *Ante* at 131 n 36. But in *Mitcham*, this Court was referring to an *appellant's* failure to brief an issue in a civil case, not to an appellee's failure to discuss an issue in response.[1]

Indeed, this Court expressly declined to apply the *Mitcham* abandonment rule to an appellee in a criminal case. In *People v Smith*, 439 Mich 954 (1992), this Court vacated the portion of a Court of Appeals judgment that reversed a defendant's convictions on the ground that the prosecution had confessed error by failing to file a brief. This Court explained:

> A party who seeks to raise an issue on appeal but who fails to brief it may properly be considered to have abandoned the issue. *Mitcham v Detroit*, 355 Mich 182, 203 (1959). However, *the failure of an appellee to file a responsive brief may not properly be considered to be a confession of substantive error*. [*Id.* (emphasis added).]

If, as this Court held in *Smith*, an appellee's failure to file a brief altogether does not constitute a confession of

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[1] Similarly, the majority's citation of *Gross v Gen Motors Corp*, 448 Mich 147, 162 n 8; 528 NW2d 707 (1995), and *Dwelley v Tom McDonnell, Inc*, 334 Mich 229, 233; 54 NW2d 217 (1952), for the proposition that "a party is bound to the theory on which the cause was prosecuted or defended in the court below" is erroneous because neither *Gross* nor *Dwelley* suggested that an appellee's failure to address an issue correctly in a responsive brief precludes an appellate court from addressing the issue.

error, then it follows that an appellee's filing of a brief that does not address a particular issue also is not a confession of error. The majority essentially overrules *Smith* by indirection without acknowledging that it is doing so.

The majority's new "appellee waiver" rule not only distorts our caselaw, but may also have very serious real-world consequences for our state's criminal justice system in these difficult economic times. Apparently because of budget constraints, the prosecution does not file appellee briefs in 19 percent of the criminal appeals in the Court of Appeals. Yet the majority now punishes the people of this state for failing to file a brief by creating what amounts to an automatic rule of reversal in one-fifth of the criminal appeals in our state.

Indeed, the dissenting judge in the Court of Appeals in *Smith* noted this very concern by explaining that reversing a conviction on the ground that the prosecution had not filed a brief "would result in the unnecessary reversal of validly obtained convictions" and "would constitute an even greater waste of this state's already taxed law enforcement, prosecutorial, and judicial resources than that occasioned by this Court's review of both sides of an issue on appeal." *People v Smith*, 190 Mich App 352, 359; 475 NW2d 857 (1991) (DANHOF, C.J., dissenting).

An appellate court is obligated to articulate and apply the governing legal principles correctly regardless of whether the parties or lower courts have done so. That is why an appellate court will affirm a lower court's judgment if it reached the correct result albeit for the wrong reason. See, e.g., *American Alternative Ins Co, Inc v York*, 470 Mich 28, 33; 679 NW2d 306 (2004) ("The trial court and the Court of Appeals applied the wrong legal standards. However, because the Court of Appeals

reached the correct result, we affirm the Court of Appeals decision for the reasons stated herein.").

The majority's decision subverts this fundamental duty by declining to apply the waiver principles explicated in *Carter*. We should not pretend that no waiver occurred merely because the prosecution's responsive brief did not correctly articulate the appropriate manner to resolve the issues raised on appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel rendered ineffective assistance, but the majority does not analyze this issue under the two-part test for ineffective assistance of counsel set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To satisfy the *Strickland* standard, a defendant bears a heavy burden to show that counsel made errors so serious that he was not performing as the counsel guaranteed by the Sixth Amendment, and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Moreover, the defendant must establish prejudice, i.e., a reasonable probability that but for counsel's error, the result of the proceeding would have been different. See *People v Dendel*, 481 Mich 114, 124-125; 748 NW2d 859 (2008); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

The majority does not explain whether, and if so, why, it believes defendant has met the heavy burden required to establish ineffective assistance of counsel. In any event, counsel's acquiescence in the scoring of OV 9 was not an error at all, let alone an error so serious as to deprive defendant of the counsel guaranteed by the Sixth Amendment. At the time of sentencing, the existing caselaw provided that a defendant's conduct during

the continuum of events surrounding the offense could be considered in scoring the offense variables. See *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003) ("[W]here the Legislature has not precluded it, we find that where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense."); *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994) (stating that when scoring OV 6 of the former judicial guidelines, which corresponded with current OV 9, victims involved in the transaction giving rise to the conviction may be considered).

At the time of sentencing, counsel could not have known that the then-controlling caselaw would be swept aside by the majority's new rule confining the scoring of offense variables to the definitional elements of the sentencing offense. The failure to anticipate a change in the law generally does not constitute ineffective assistance of counsel. *Mullican v United States*, 469 F Supp 2d 498, 504 (ED Tenn, 2007), citing *Brunson v Higgins*, 708 F2d 1353, 1356 (CA 8, 1983); see also *Lucas v O'Dea*, 179 F3d 412, 420 (CA 6, 1999) ("Only in a rare case will a court find ineffective assistance of counsel based upon a trial attorney's failure to make an objection that would have been overruled under the then-prevailing law.") (quotation marks omitted); *Kornahrens v Evatt*, 66 F3d 1350, 1360 (CA 4, 1995) ("Based on this clear precedent, we cannot say that, under the facts of this case, [counsel's] trial performance was constitutionally deficient because he followed a long-standing and well-settled rule of South Carolina criminal law—*even when that rule was under attack in the United States Supreme Court at the time of trial*.") (emphasis added).

Thus, counsel's acquiescence in the scoring of OV 9 does not satisfy the deficient performance prong of *Strickland*. The failure to anticipate that this Court would one day invent an elements-only test for scoring offense variables in contravention of caselaw in effect at the time of sentencing does not constitute ineffective assistance of counsel.

III. WHEN IS THE SENTENCING OFFENSE COMPLETED?

The majority's central holding is that a defendant's conduct occurring after an offense is completed may not be considered in scoring the offense variables unless the statutory provision for a particular variable instructs otherwise. The central flaw in the majority's analysis is that it completely begs the question of *when* an offense is completed. Indeed, the majority expressly avoids this question in this case, providing only an amorphous analysis regarding whether the challenged conduct was "far beyond and removed" from the underlying offense. *Ante* at 135 n 45. Rather than permitting sentencing courts to analyze the res gestae of a sentencing offense as we do in other contexts, the majority artificially limits consideration of the offense to its definitional elements. Not once does the majority even attempt to explain why or on what authority it has imposed this limitation.

The majority's new elements-only rule has no basis in Michigan caselaw. In *Chesebro*, the Court of Appeals held that only victims involved in the transaction underlying the sentencing offense could be considered in scoring OV 6 of the former judicial guidelines:

> We think the rule that more accurately applies the sentencing guidelines is that the offense variables are to be scored *only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is*

> *being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise*. [*Chesebro*, *supra* at 471 (emphasis added).]

We analyzed scoring decisions under OV 9 of the current legislative sentencing guidelines in *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004), and *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008). In *Morson*, the defendant's accomplice committed an armed robbery against Deborah Sevakis. A bystander, James Bish, was shot while chasing the accomplice *after the elements of armed robbery were completed*. This Court held:

> Defendant was assessed ten points by the sentencing court for two victims: Deborah Sevakis and James Bish. The Court of Appeals reversed that determination by the sentencing court, concluding that Sevakis was the only victim of the armed robbery. We disagree with the Court of Appeals and therefore reverse its conclusion regarding OV 9.
>
> Pursuant to the plain language of the statute, the sentencing court is to count "each person who was placed in danger of injury or loss of life" as a victim. Though Sevakis was the only person actually robbed, Bish, who was standing nearby and responded to Sevakis's call for help, was also "placed in danger of injury or loss of life" by the armed robbery of Sevakis. Consequently, the sentencing court properly counted Bish as a victim and properly scored defendant under OV 9. [*Morson*, *supra* at 261-262.]

Although Justice YOUNG dissented on other issues in *Morson*, he agreed with the majority's analysis of OV 9:

> I agree with the majority that the trial court did not err when it assessed ten points for offense variable (OV) 9. The language of MCL 777.39(2)(a) clearly states that *each* person "placed in danger of injury or loss of life" is to be counted as a victim. *Because a gun was fired at him*, James Bish was placed in danger even if he had not intervened or

been injured. [*Id*. at 277 (YOUNG, J., concurring in part and dissenting in part) (second emphasis added).]

Thus, *all* persons placed in danger during the course of a crime are properly counted as victims for the purposes of OV 9.

Nothing in *Morson* suggests that only the definitional elements may be used in scoring the offense variables. On the contrary, conduct that occurred *after* the elements were satisfied supported the OV 9 scoring decision. Thus, *Morson* supports the conclusion that every person placed in danger *during the criminal event* may count as a victim under OV 9.[2]

In *Sargent*, a criminal sexual conduct case, the sentencing court assessed 10 points for OV 9 on the basis that there were two victims: the complainant and her sister, whom the defendant had sexually abused previously. In a unanimous decision, this Court remanded for resentencing because the abuse of the complainant's sister was not part of the sentencing offense transaction and only conduct relating to the offense could be considered when scoring the offense variables.

We explained in *Sargent* that the offense variables are generally offense specific because their primary focus is the nature of the offense. We quoted several provisions that focused on "the offense" for purposes of scoring the guidelines. *Sargent*, *supra* at 348. We also noted that MCL 769.31(d) defines "offense characteristics" as "the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate." *Id*. Thus, we held, only conduct "relating to the offense" may be

[2] Then-Justice KELLY and Justice CAVANAGH were in the majority in *Morson*, yet they make no attempt to explain their sudden change of opinion here.

considered when scoring the offense variables. *Id*. at 349. This conclusion was reinforced by the fact that the statutes for some offense variables specifically provide for considering factors unrelated to the offense being scored. *Id*. at 349-350. We thus concluded that "only conduct that relates to the offense being scored may be considered." *Id.* at 350.

We then stated that "when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Id.* Noting that the jury did not convict the defendant of abusing the complainant's sister and that the abuse of the sister did not arise out of the same transaction as the abuse of the complainant, we concluded that zero points should have been assessed for OV 9. *Id*. at 351.

And as discussed, Court of Appeals caselaw applying the legislative guidelines also suggests that the entire criminal transaction may be considered in scoring the offense variables. In *Cook*, the defendant challenged the use of his conduct in fleeing the police to assess 10 points for OV 19 (interference with the administration of justice) when calculating his minimum sentence for assault with intent to do great bodily harm less than murder. The defendant argued that his flight from the police did not occur during the assault. The Court of Appeals found no basis for the defendant's argument in the plain language of the statute.

> In drafting the sentencing guidelines scoring instructions, the Legislature could have expressly prohibited sentencing courts from considering facts pertinent to the calculation of the sentencing guidelines range for one offense from being also used to calculate the sentence guidelines range for another offense, but it did not do so. Moreover, where the Legislature has not precluded it, we

> find that *where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense*. Thus, the trial court did not err in scoring ten points under OV 19 for defendant's assault conviction. [*Cook*, *supra* at 641 (emphasis added).]

See also *People v Gullet*, 277 Mich App 214, 218; 744 NW2d 200 (2007) (holding that the sentencing court had improperly "looked beyond the criminal transaction that supported the conviction when it scored 10 points for OV 9").

In short, all these cases support the conclusion that a court may consider the criminal transaction when scoring the offense variables. Until today's decision, a sentencing court was never required to confine its analysis only to the definitional elements of the sentencing offense.

More broadly, the res gestae concept is deeply embedded in our caselaw. For example, in *People v Gillis*, 474 Mich 105, 109; 712 NW2d 419 (2006), we held that in felony murder, a defendant's "perpetration" of the predicate felony includes acts that occur outside the definitional elements but during "the unbroken chain of events surrounding that felony." "Because defendant at the time of the collision was attempting to escape detection after having been identified during the home invasion, a reasonable juror could conclude that he was still 'in the perpetration of' the home invasion." *Id*.

Although the analysis in *Gillis* hinged in part on the definition of "perpetration" in the first-degree murder statute, a term that is not used in the offense variable provisions, it is nonetheless useful in demonstrating that an offense may remain ongoing after the completion of the definitional elements. We noted in *Gillis* that

the "commission of the felony itself does not render the defendant's criminal plan complete. When a defendant plans to commit a felonious act, it is 'a legitimate assumption that . . . [the defendant] also planned to escape from the scene of his crime.' " *Id*. at 115-116 (citation omitted). We noted that "escape is 'as important to the execution of the [felony]' as the elements of the crime itself." *Id*. at 116 (citation omitted).

> In other words, a felon has not "carried out" or "completed" the felony for felony-murder purposes until the felon has escaped. A murder committed during the attempt to escape is committed "in the perpetration of" that felony, because the felonious transaction has not yet been completed. Accordingly, "perpetration" includes not only the definitional elements of the predicate felony, but also includes *those acts that are required to complete the felony—such as those that occur after the commission of the predicate felony while the felon is attempting to escape* . . . .
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> * * *
>
> "A burglar may be said to be engaged in the commission of the crime of burglary while making away with the plunder, and while engaged in securing it. So, a robbery within the meaning of a rule that a homicide committed in the perpetration of a robbery is murder in the first degree is not necessarily concluded by the removal of the goods from the presence of the owner; and it is not necessary that the homicide should be committed at the precise time and place of the robbery. *As in the case of burglary, the robber may be said to be engaged in the commission of the crime while he is endeavoring to escape and make away with the goods taken*." [*Id*. at 116-117, 120, quoting Wharton, Law of Homicide (3d ed), § 126, p 186) (emphasis added).]

In short, under the res gestae rule, a murder that occurs during the "unbroken chain of events surrounding the predicate felony" is committed in the perpetration of that felony. *Gillis*, *supra* at 121. Time, place,

causation, and continuity of action determine whether the murder occurred in perpetration of the predicate felony. *Id*. at 127.

Moreover, this Court's use of the res gestae principle is not limited to the felony murder context. It is firmly rooted in our caselaw and used to describe not only the elements of the offense, but also the body of facts necessary to prove and support those elements. See, e.g., *People v Kayne*, 268 Mich 186; 255 NW 758 (1934); *People v Sholl*, 453 Mich 730; 556 NW2d 851 (1996). A leading treatise concisely explains the res gestae principle:

> The res gestae includes circumstances, facts and declarations which grow out of the main fact, contemporaneous with it, and serve to illustrate its character. Normally facts and circumstances surrounding the commission of a crime are properly admissible as part of res gestae; however, use of testimony by the prosecutor to create prejudicial inferences unsupported by evidence is improper.
>
> No inflexible rule has ever been, and probably one can never be adopted as to what is a part of the res gestae. It must be determined largely in each case by the peculiar facts and circumstances of the case, but it may be stated as a fixed rule that included in the res gestae are the facts which so illustrate and characterize the principal fact as to constitute the whole of one transaction. So long as a transaction continues, so long do acts and deeds emanating from it became [sic] a part of it, they may be described in a court of justice. There is no limit of time within which the res gestae can be arbitrarily confined. [1A Gillespie, Michigan Criminal Law and Procedure, § 18:72, pp 445-446.]

In light of our well-established caselaw addressing res gestae, I cannot discern why this Court should now invent a wholly different rule for determining when an offense is complete for purposes of applying the offense variables. Even accepting, as we stated in *Sargent*, that

the offense variables are offense specific and that the focus must be on the nature of the sentencing offense, the majority fails to explain why only the definitional elements may be considered. If, as we stated in the felony murder context, a felony is ongoing and not yet complete while the felonious transaction continues, then why cannot a sentencing court consider the full continuum of a defendant's conduct during that transaction for the purpose of scoring the offense variables? Further, in relation to any offense, the court will have already heard the entire res gestae of the crime during the trial or other proceedings and should be allowed to consider those aggravating and mitigating factors affecting the seriousness of the offense when relevant to scoring particular variables.

The elements are traditionally used to determine whether the prosecution has presented sufficient evidence to support a charge or a conviction, not to define the res gestae of the offense. Indeed, the majority's new rule collapses the duration of a criminal offense so that it begins and ends at precisely the same instant. A prosecutor cannot charge a crime until the last element has been completed. At the most, a prosecutor could charge only for an attempt if all the elements have not been completed. Yet under the majority's opinion, the crime also *stops* immediately upon the completion of the elements. That is, at the precise moment the crime can be charged, the majority would stop the clock for the purpose of scoring the sentencing guidelines. Why?

As we explained in *Sargent*, MCL 769.31(d) defines "offense characteristics" as "the elements of the crime *and* the aggravating and mitigating factors *relating to the offense* that the legislature determines are appropriate." (Emphasis added.) In contravention of the statute and our analysis in *Sargent*, the majority now limits

consideration to the elements and requires courts to ignore any other facts and circumstances "relating to the offense" that occur during the res gestae of the crime.

Not once does the majority even attempt to explain why or how it has reached the remarkable conclusion that a defendant's flight from the scene of the crime is not an "aggravating . . . factor[] relating to the offense . . . ." Instead, the majority simply gives no effect to the portion of the statute that does not support its new standard, focusing only on the reference to "the elements of the crime" while disregarding the phrase "and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate." MCL 769.31(d).

The majority's suggestion that it can ignore defendant's escape attempt because defendant was not convicted of fleeing and eluding reflects a mistaken understanding of MCL 769.31(d). Again, that statute defines "offense characteristics" as

> the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate. For purposes of this subdivision, an offense described in . . . MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered as an aggravating factor.

This provision requires that certain offenses that result in a conviction must be considered as aggravating factors. But contrary to the majority's suggestion, it does not say that other contemporaneous offenses that do not result in a conviction or that are not listed in MCL 791.233b cannot be considered as aggravating factors.

Next, it is true, as we stated in *Sargent*, that some of the offense variable provisions expressly require consideration of facts that are not offense specific. But most of the examples cited contemplate consideration of events falling not only outside the definitional elements of the sentencing offense, but outside the criminal transaction itself. Thus, the statutory provisions for those offense variables would not be nullified by considering the criminal transaction in scoring all offense variables. And although OV 14 (leader in a multiple offender situation) does expressly refer to the "entire criminal transaction," MCL 777.44(2)(a), this language merely emphasizes the broader focus when the defendant is a leader of other offenders. In other words, the reference to the "entire criminal transaction" in this provision merely reflects that OV 14 uniquely pertains to multiple offender situations.

Moreover, the majority's elements-only test violates the very purpose of the sentencing guidelines: to promote uniformity and consistency in sentencing.[3] To that end, we have held that departure from the guidelines recommended minimum sentence range is meant to be the exception, not the rule.[4] Despite this well-established standard and without acknowledging the inconsistency created, the majority states that the trial

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[3] See *People v Smith*, 482 Mich 292, 311-312 & n 46; 754 NW2d 284 (2008); former MCL 769.33(1)(e)(*iv*), as added by 1994 PA 45 (providing that one of the Sentencing Commission's tasks was to develop sentencing guidelines that "[r]educe sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences"); *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003) ("The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.").

[4] *Smith*, *supra* at 299, citing *Babcock*, *supra* at 257-258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995).

court may consider factors within the criminal transaction but outside the elements when departing from the guidelines range. This reasoning is simply unsupported by the law of this state.

Indeed, those justices in the majority in this case who were also in the majority in *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008), have failed to explain their inconsistent positions. Contrary to the analysis in *Smith*, the majority today suggests that sentencing courts should depart freely from the guidelines recommended range by considering factors outside the elements of the offense that may not be considered when scoring the offense variables. This invitation to depart more readily from the guidelines will likely cause a dramatic increase in the number of sentencing appeals, which our appellate courts will have to review under the rigid framework demanded by *Smith*.

In this case, I would hold that defendant was properly assessed 10 points for OV 9. Defendant argues that even if his escape attempt were to be considered, his accomplices could not be considered victims for the purpose of scoring OV 9. But the version of MCL 777.39(2)(a) applicable in this case stated: "Count *each person* who was placed in danger of injury or loss of life as a victim." (Emphasis added.) Defendant's accomplices occupied the car that crashed into a fence during a police chase, obviously putting them in danger of physical injury. "Each person" is not a difficult phrase to understand, and it does not exclude accomplices. A person's guilt or innocence does not affect whether that person was placed in danger.

Defendant further contends that no evidence existed that he was driving the getaway vehicle when it crashed into the fence. The police officer, however, saw a person with light hair inside the fleeing vehicle, and defendant

had red hair, which could be viewed as light.[5] In any event, defendant at the very least aided and abetted the escape attempt, and he cannot now avoid responsibility for participating in the flight from the police that led to the crash into a fence.

IV. CONCLUSION

Accordingly, I would affirm the judgment of the Court of Appeals. Defendant waived his claim that OV 9 was incorrectly scored when his attorney conceded at sentencing that the guidelines minimum sentence ranges for his offenses "appear to be correct." Counsel was not ineffective in making this concession, given that the caselaw in effect at the time of sentencing supported the OV 9 score. Finally, the majority's new elements-only rule for scoring offense variables has no basis in our caselaw. The Court of Appeals properly considered the entire res gestae of the sentencing offense in concluding that the evidence supported the scoring decision.

WEAVER and YOUNG, JJ., concurred with CORRIGAN, J.

[5] The presentence investigation report states that the officer "could observe a male subject with light hair, who then put a black hood over his head. *There were no other occupants visible in the car*." (Emphasis added.) Contrary to the implication of the majority, it is a reasonable inference that the only person the officer saw in the vehicle was the driver of that vehicle.

BUSH v SHABAHANG

Docket Nos. 136617, 136653, and 136983. Argued April 8, 2009 (Calendar No. 5). Decided July 29, 2009.

Gary L. Bush, as guardian of Gary E. Bush, a protected person, brought a medical malpractice action in the Kent Circuit Court against Behrooz-Bruce Shabahang, M.D., and others, seeking damages for injuries allegedly suffered by Gary E. Bush as a result of surgery to repair an aortic aneurysm. The court, George S. Buth, J., granted summary disposition in favor of defendants George T. Sugiyama, M.D., M. Ashraf Mansour, M.D., and Vascular Associates, P.C. The court also granted summary disposition in favor of defendant Spectrum Health Butterworth Campus, to the extent that its alleged liability was based on the actions of Sugiyama and Mansour and with regard to the claims of negligence on the part of Spectrum Health's physician's assistants. Summary disposition was denied with regard to the other defendants. The court also determined that the complaint was not prematurely filed. The Court of Appeals denied applications for leave to appeal by Shabahang, John C. Heiser, M.D., West Michigan Cardiovascular Surgeons, and Spectrum Health in unpublished orders entered August 4, 2006 (Docket Nos. 270433, 270437, and 270897). The Supreme Court, in lieu of granting leave to appeal, remanded the matter to the Court of Appeals for consideration as on leave granted. 477 Mich 934 (2006); 477 Mich 935 (2006). The cases were consolidated. The Court of Appeals, SMOLENSKI and BECKERING, JJ. (FITZGERALD, P.J., concurring in part and dissenting in part), held that the plaintiff's notice of intent to file his action met the minimum requirements of MCL 600.2912b for statements of the standard of care and proximate cause with regard to Heiser and Shabahang and gave adequate notice that West Michigan Cardiovascular Surgeons and Spectrum Health could be vicariously liable for the actions of Heiser and Shabahang. Because the notice of intent did not give adequate notice with respect to the plaintiff's claims alleging that West Michigan Cardiovascular Surgeons and Spectrum Health were directly liable for negligent hiring or failing to train other staff members, the cases were remanded for the entry of an order of partial summary disposition without prejudice in favor of West Michigan Cardiovascular Surgeons and Spectrum Health. The Court of Appeals also held that a plaintiff need not challenge the sufficiency of a

defendant's response to the plaintiff's notice of intent before the plaintiff may properly commence the action after the expiration of the 154-day period specified in MCL 600.2912b(8) in reliance on the plaintiff's belief that the defendant's response did not meet the requirements of MCL 600.2912b(7), although the trial court may dismiss the suit if it later determines that the defendant's response was adequate. 278 Mich App 703 (2008). The Supreme Court consolidated the cases and ordered and heard oral argument on whether to grant the applications for leave to appeal or take other peremptory action. 482 Mich 1014 (2008). The Supreme Court subsequently granted the defendants' applications for leave to appeal. 482 Mich 1105 (2008).

In an opinion by Justice HATHAWAY, joined by Chief Justice KELLY and Justices CAVANAGH and WEAVER, the Supreme Court *held*:

Pursuant to the 2004 amendment of MCL 600.5856(c), a timely filed notice of intent tolls the statute of limitations even if the notice of intent contains defects. Defects in notices of intent may be amended or disregarded under MCL 600.2301 if the substantial rights of the parties are not affected, provided that the cure is in the furtherance of justice and has terms that are just. A cure is in the furtherance of justice when a party has made a good-faith attempt to comply with the content requirements of MCL 600.2912b. A plaintiff may take advantage of the 154-day waiting period provided in MCL 600.2912b(8) if a defendant fails to make a good-faith attempt to reply to the plaintiff's notice of intent in compliance with the statutory content requirements.

1. Former MCL 600.5856(d), the predecessor provision of MCL 600.5856(c), stated that the statute of limitations was tolled after the date notice was given in compliance with MCL 600.2912b. The Legislature amended that provision in 2004 to state that the statute of limitations is tolled at the time notice is given in compliance not with § 2912b, but with the applicable notice period under § 2912b. A comparison of the preamendment provision and the postamendment provision indicates that the focus of the operative language has been limited to compliance with the applicable notice period, rather than compliance with § 2912b in its entirety. This Court must assume that an express legislative change denotes either a change in the meaning of the statute itself or a clarification of the original legislative intent of the statute. In this case, the clear language of § 2912b and § 5856(c) as amended indicates that if a plaintiff files a timely notice of intent before commencing a medical malpractice action, the statute of limitations is tolled despite the presence of defects in the notice of intent.

Although *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57 (2002), reached the opposite conclusion, it did so on the basis of the preamendment language.

2. MCL 600.2912b provides that a plaintiff may not commence an action for medical malpractice without filing a timely notice of intent; however, the statute is silent regarding the consequences of filing a defective notice of intent, and it makes no reference to a mandatory dismissal penalty in the event of a defect. The fact that the Legislature considered and rejected a mandatory dismissal clause for the proposed provision codifying notices of intent indicates that the Legislature did not intend this penalty to be imposed. Further, mandatory dismissal with prejudice would be inconsistent with the stated purpose of § 2912b, which is to provide a mechanism for promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs. Considering § 2912b in the context of the broader medical malpractice statutory scheme, which is a balanced scheme that imposes equivalent requirements on plaintiffs and defendants, it would be inconsistent to assume that the Legislature intended to impose the harsh penalty of dismissal with prejudice on plaintiffs, while the only other penalty provision in § 2912b is a relatively minor shortening of a defendant's waiting period.

3. MCL 600.2301 gives courts the power to cure certain defects within processes, pleadings, or proceedings for the furtherance of justice and on terms that are just, at any time before judgment in the matter is rendered. Because service of a notice of intent is clearly part of a medical malpractice process or proceeding, this provision may be employed to cure defects in a notice of intent. This mechanism will not affect the substantial rights of defendants in medical malpractice cases, because those parties are sophisticated health professionals with extensive medical background and training and, as such, will be able to understand the nature of the claims against them even if the notice of intent is defective. The requirement that the cure be in the furtherance of justice is satisfied when a party makes a good-faith attempt to comply with the content requirements of § 2912b. In this case, the plaintiff provided a 13-page notice of intent that made a good-faith attempt to address each of the subdivisions enumerated in § 2912b(4), and the Court of Appeals correctly held that the vast majority of the notice was in compliance with § 2912b(4). However, because Shabahang's one-page response to the plaintiff's notice of intent was nothing more than a blanket denial of

any wrongdoing, it does not constitute a good-faith attempt to comply and is not subject to § 2301. Accordingly, the plaintiff was not required to wait the full 182-day period before filing suit.

Affirmed in part, reversed in part, and remanded for further proceedings.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissenting, would hold that a plaintiff's notice of intent must comply with the requirements of § 2912b(4) in order to toll the statute of limitations pursuant to § 5856(c). This gives full effect to all of § 5856(c) and interprets it in harmony with § 2912b, contrary to the majority's interpretation, which relies on only a portion of § 5856(c), ignores the relationship between § 5856(c) and § 2912b, and uses the amendment of § 5856(c) to alter the clear language of § 2912b. He would further hold that, pursuant to § 2912b(8), a plaintiff may commence an action 154 days after giving notice if the defendant's response does not comply with the requirements of § 2912b(7). This interpretation relies on the clear language of § 2912b and, contrary to the majority's interpretation, does not create a "good-faith" requirement on the part of the defendant that lacks any basis in the statute. In reaching its interpretations of § 2912b and § 5856(c), the majority ignores precedent and statutory language, abandons traditional approaches to statutory interpretation, concocts new rules and standards that have no grounding in the law, and generally confuses and obscures the procedures that must be followed as a condition to filing a medical malpractice lawsuit.

1. ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A CLAIM — DEFECTIVE NOTICE OF INTENT — LIMITATION OF ACTIONS.

A timely but defective notice of intent to commence a medical malpractice action tolls the statute of limitations (MCL 600.5856[c]).

2. ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A CLAIM — DEFECTIVE NOTICE OF INTENT.

A court is not required to dismiss with prejudice a claim for medical malpractice if the notice of intent to commence the action was defective.

3. ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A CLAIM — DEFECTIVE NOTICE OF INTENT — CURE FOR DEFECTIVE NOTICE OF INTENT.

The statutory provision that gives courts the power to cure defects within processes, pleadings, or proceedings for the furtherance of justice may be employed to cure defects in a notice of intent if a

party has made a good-faith attempt to comply with the content requirements of the statutory notice provision (MCL 600.2301).

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Hackney, Grover, Hoover & Bean, PLC (by *Richard K. Grover, Jr.*, *Susan M. Ramage*, and *Jeffrey K. Wesorick*), for Behrooz-Bruce Shabahang, M.D.

Rhoades McKee (by *Mark E. Fatum* and *Douglas P. Vanden Berge*) for Spectrum Health Butterworth Campus.

Aardema, Whitelaw & Sears-Ewald, PLLC (by *Brian W. Whitelaw* and *Timothy P. Buchalski*), for John Heiser, M.D., and West Michigan Cardiovascular Surgeons.

Amici Curiae:

Mark Granzotto, P.C. (by *Mark Granzotto*), for the Michigan Association for Justice.

Foster, Swift, Collins & Smith, P.C. (by *Richard C. Kraus*), for the University of Michigan.

HATHAWAY, J. At issue before this Court is the proper interpretation of MCL 600.5856(c), as amended by 2004 PA 87, effective April 22, 2004. We have been asked to consider whether a defect in a timely mailed notice of intent (NOI), provided to a medical malpractice defendant pursuant to MCL 600.2912b, precludes the tolling of the statute of limitations on a plaintiff's medical malpractice claim. We also consider whether, and under what circumstances, a plaintiff may take advantage of the 154-day statutory waiting period provided under MCL 600.2912b(8).

We conclude that the 2004 amendments of MCL 600.5856 have significantly clarified the proper role of an NOI provided pursuant to MCL 600.2912b. While the former statute, MCL 600.5856(d), has been interpreted to preclude tolling when defects are found in an NOI, the current statute, § 5856(c), makes clear that the question whether tolling applies is determined by the timeliness of the NOI. Thus, if an NOI is timely, the statute of limitations is tolled despite defects contained therein. Moreover, in light of this significant clarification of § 5856, we hold that the purpose of the NOI statute is better served by allowing for defects in NOIs to be addressed in light of MCL 600.2301, which allows for amendment and disregard of "any error or defect" where the substantial rights of the parties are not affected and the cure is in the furtherance of justice. We hold that the mandates of § 2301 are met when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Finally, we hold that a plaintiff may take advantage of the 154-day waiting period provided in § 2912b(8) where a defendant fails to make a good-faith attempt to reply to the plaintiff's NOI in compliance with the statutory content requirements.

We therefore affirm the Court of Appeals in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The underlying facts and procedural history of this case were well set forth by the Court of Appeals. The Court of Appeals summarized:

> On August 7, 2003, Gary E. Bush (Bush), who was 33 at the time, had surgery to repair an aortic aneurysm at Spectrum Health's Butterworth Campus. [Behrooz-Bruce] Shabahang and [John] Heiser, who are surgeons employed by [West

Michigan] Cardiovascular [Surgeons], performed the surgery. Plaintiff [Gary L. Bush], Bush's guardian, claims that when Shabahang cut open Bush's chest, he lacerated the aneurysm, which made it necessary for Heiser to cannulate Bush's femoral artery and femoral vein so that Bush could be placed on a heart-bypass machine before the surgery could proceed. Defendants George T. Sugiyama, M.D., and M. Ashraf Mansour, M.D., who are vascular surgeons with defendant Vascular Associates, P.C., repaired Bush's femoral artery and femoral vein, respectively. According to plaintiff, the injuries Bush suffered during the surgery and during his recovery rendered him unable to lead an independent life.

On August 5, 2005, which was just days before the expiration of the applicable period of limitations, plaintiff served a notice of intent to file a medical-malpractice complaint against Shabahang, Heiser, Sugiyama, Mansour, [West Michigan] Cardiovascular, Vascular Associates, and Spectrum Health. Sugiyama, Mansour, Vascular Associates, and Shabahang responded to plaintiff's notice as required by MCL 600.2912b(7). On January 27, 2006, which was 175 days after plaintiff served notice on defendants, plaintiff filed his complaint against all defendants.

Shortly thereafter, Sugiyama, Mansour, and Vascular Associates moved for summary disposition under MCR 2.116(C)(7), (8), and (10). They argued that dismissal was appropriate on two grounds: (1) plaintiff failed to file a notice that complied with the requirements of MCL 600.2912b, and (2) plaintiff failed to wait the required 182 days before filing his complaint. Shabahang, Heiser, and [West Michigan] Cardiovascular joined the motion. Spectrum Health later filed its own motion for summary disposition based solely on the alleged deficiency of the notice.

In response to these motions, plaintiff argued that the notice met the minimum statutory requirements. Plaintiff responded to the allegations that the complaint was prematurely filed by arguing that the responses to the notice were deficient. Because defendants' responses to the notice were deficient, plaintiff contended that he could properly file his complaint after 154 days from the date of service of the notice. Hence, plaintiff concluded, his complaint was not prematurely filed.

> The trial court determined that the notice was insufficient with regard to Sugiyama, Mansour, and Vascular Associates. On the basis of that conclusion, the trial court granted summary disposition in favor of Sugiyama, Mansour, and Vascular Associates. The trial court also granted summary disposition in favor of Spectrum Health, but only to the extent that its alleged liability was based on the actions of Sugiyama and Mansour. The trial court also granted summary disposition in favor of Spectrum Health with regard to the claims of negligence on the part of Spectrum Health's physician assistants because plaintiff failed to file a conforming affidavit of merit. However, "[a]s to the other doctors and defendants . . . the Court's of the opinion that the [notice] is clearly sufficient, so those motions are denied." The trial court also determined that plaintiff's complaint was not prematurely filed.[1]

Defendants appealed the trial court's orders. The Court of Appeals consolidated defendants' applications for leave to appeal. On May 1, 2008, the Court of Appeals issued a published opinion affirming in part, reversing in part, and remanding to the trial court for further proceedings.[2] The Court of Appeals held that, when read as a whole, the NOI was sufficient to comply with the requirements of MCL 600.2912b(4), except with regard to the claims of direct liability for training and supervision against West Michigan Cardiovascular. The Court also concluded that certain claims for vicarious liability against Spectrum Health were inadequately pled.[3] Accordingly, the Court of Appeals reversed the trial court's denial of summary disposition on the deficiently pled direct liability claims and re-

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[1] *Bush v Shabahang*, 278 Mich App 703, 706-708; 753 NW2d 271 (2008).

[2] *Id*. at 726-727.

[3] The Court of Appeals held that the claims for vicarious liability for the physician's assistants and the nursing staff were inadequately pled, but the claims against Heiser and Shabahang were sufficient.

manded to the trial court for an order granting the motion for summary disposition and dismissing the claims without prejudice. The Court of Appeals affirmed the trial court's ruling that plaintiff's complaint was timely filed, holding that plaintiff could avail himself of the shortened 154-day waiting period because the defendants' response to the NOI was deficient. Defendant Spectrum Health's motion for reconsideration of the opinion was denied.

Defendants filed three separate applications for leave to appeal in this Court. This Court consolidated the appeals and granted oral argument on the applications.[4] After oral argument on the applications, this Court granted leave to appeal.[5]

II. STANDARD OF REVIEW

The issues presented are issues of statutory interpretation. Statutory interpretation is a question of law, which this Court reviews de novo.[6] This Court also reviews de novo a trial court's decision regarding a motion for summary disposition.[7]

III. ANALYSIS

A. MCL 600.5856(c) AND TOLLING

The first issue this Court is asked to address is whether the defects identified in plaintiff's NOI act to bar tolling of the statute of limitations under MCL 600.5856(c), as amended by 2004 PA 87, effective April

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[4] *Bush v Shabahang*, 482 Mich 1014 (2008).

[5] *Bush v Shabahang*, 482 Mich 1105 (2008).

[6] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[7] *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

22, 2004. Our analysis necessarily begins with a review of the language of § 5856 before and after the 2004 amendments.

The relevant language of § 5856(d), the predecessor to § 5856(c),[8] provided that tolling is operative if the "notice is given *in compliance with section 2912b*." (Emphasis added.) The relevant language of § 5856(c) currently provides that tolling is operative "[a]t the time notice is given *in compliance with the applicable notice period under section 2912b* . . . ." (Emphasis added.) The question arises whether the amendment mandates compliance with the entirety of § 2912b, such that a defective NOI does not get the benefit of tolling, or whether the new language focuses on compliance with only the applicable notice period in § 2912b, such that a defective NOI tolls the statute of limitations as long as it is compliant with the notice period.

This question was seemingly answered in *Roberts v Mecosta Co Gen Hosp* (*Roberts I*)[9] and *Boodt v Borgess Med Ctr*,[10] both of which held that a defect in an NOI precludes tolling of the statute of limitations during the 182-day waiting period. *Roberts I* opined that MCL 600.5856(d) and MCL 600.2912b were inextricably tied. The Court held that "the statute of limitations cannot be tolled under MCL 600.5856(d) unless notice is given in compliance with all the provisions of MCL 600.2912b."[11]

However, this holding was foundationally premised on the pre-amendment language. The Court explained:

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[8] The former § 5856(d) was renumbered by the amendment and now appears as § 5856(c).

[9] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 642 NW2d 663 (2002).

[10] *Boodt v Borgess Med Ctr*, 481 Mich 558, 561; 751 NW2d 44 (2008).

[11] *Roberts I*, 466 Mich at 59.

> Section 5856(d) clearly provides that notice must be compliant with § 2912b, not just § 2912b(2) as plaintiff contrarily contends. Had the Legislature intended only the delivery provisions of § 2912b to be applicable, we presume that the Legislature would have expressly limited compliance only to § 2912b(2). However, the Legislature did not do so. Rather, it referred to all of § 2912b.
>
> Since the statute is clear and unambiguous, this Court is required to enforce § 5856(d) as written. As a result, the tolling of the statute of limitations is available to a plaintiff only if all the requirements included in § 2912b are met.[12]

Significantly, *Roberts I* interpreted the *former* MCL 600.5856(d), as the amendment was not enacted until after *Roberts I* was decided. *Boodt*, while decided in 2008, made no reference to the 2004 amendment. Rather, it relied on the *Roberts I* interpretation of the former § 5856(d), presumably because the complaint in *Boodt* was filed prior to the 2004 amendment. Neither *Roberts I* nor *Boodt* addressed the question at issue here, namely, whether the current language of § 5856(c) mandates that defects in an NOI act as a bar to tolling of the statute of limitations. Since *Roberts I* and *Boodt* relied on language of a statute that is no longer in existence, examining the correct interpretation of § 5856(c) and its interrelationship with § 2912b is an issue of first impression.

The question this Court addresses is one of statutory construction. Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[13] In determining the intent of the Legislature, this Court must first look to the lan-

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[12] *Id*. at 64.

[13] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

guage of the statute.[14] The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature.[15] " 'As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.' "[16] Moreover, when considering the correct interpretation, the statute must be read as a whole.[17] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[18] While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme.[19] A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.[20] The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.[21] Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute.[22]

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[14] *Id*.

[15] *Id.*

[16] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570, 579 (2008), quoting *Sun Valley*, 460 Mich at 237.

[17] *Sun Valley*, 460 Mich at 237.

[18] *Herman*, 481 Mich at 366.

[19] *Id.*, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[20] *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930).

[21] *Id*. at 234.

[22] See *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 205; 13 NW2d 260 (1944).

Finally, an analysis of a statute's legislative history is an important tool in ascertaining legislative intent.[23]

To determine the intent of MCL 600.5856(c), we first look at its plain language. The pre-amendment version of § 5856 stated:

> *The statutes of limitations or repose are tolled:*
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date *notice is given in compliance with section 2912b*. [Emphasis added.]

MCL 600.5856, as amended by the Legislature in 2004, states:

> *The statutes of limitations or repose are tolled in any of the following circumstances:*
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.

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[23] See *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999).

> (c) *At the time notice is given in compliance with the applicable notice period under section 2912b*, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [Emphasis added.]

In comparing the pre- and post-amendment language, it is clear that the focus of the operative language has been clarified. *Roberts I* opined that the focus of § 5856(d) was on compliance with § 2912b in its entirety. In contrast, the focus of the new § 5856(c) is unquestionably limited to compliance with the "applicable notice period."

As *Roberts I* pointed out, if the Legislature had intended to limit the applicability of § 2912b, it would have expressly limited compliance in the statute. The 2004 amendment of § 5856 does precisely that. It limits compliance to the notice period under § 2912b. Thus, pursuant to the clear language of § 2912b and the new § 5856(c), if a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled.

Defendants ask us to disregard the change to the language of § 5856 and assume that the change was merely inadvertent. They urge us to interpret the amended statute in the same manner that *Roberts I* and *Boodt* interpreted the pre-amendment statute. We cannot do so. This Court cannot assume that language chosen by the Legislature is inadvertent.[24] To the contrary, this Court must assume that an express legislative change denotes either a change in the meaning of the statute itself or a clarification of the original legislative intent

[24] *Lawrence Baking*, 308 Mich at 205.

of the statute.[25] We cannot assume that the change means nothing at all. The language of the new § 5856(c), "compliance with the applicable notice period under section 2912b," clearly and unequivocally sets forth that a plaintiff's NOI must comply only with the applicable notice period.

In sum, neither the *Roberts I* nor the *Boodt* analysis applies in the matter before us because both analyses were based on a former version of § 5856 that is no longer in existence. The Legislature, in exercising its authority, has changed the language of the statute and we must abide by that action. Thus, we hold that, pursuant to the clear language of § 2912b and § 5856(c), if a plaintiff files a timely NOI before commencing a medical malpractice action, the statute of limitations is tolled despite the presence of defects in the NOI.

B. CONSEQUENCE OF A DEFECTIVE NOI

In light of the fact that a defective NOI does not bar tolling of the statute of limitations under § 5856(c), we must now consider what a court must do when presented with a defective NOI.[26]

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[25] *Id*. See also *Ettinger v City of Lansing*, 215 Mich App 451; 546 NW2d 652 (1996), wherein Justice MARKMAN, then sitting at the Court of Appeals and joined by then-Judge CORRIGAN, opined:

> We note that plaintiffs correctly state the general proposition that changes in statutory language presumably reflect a change in meaning. *Wortelboer v Benzie Co*, 212 Mich App 208, 217; 537 NW2d 603 (1995). However, changes in statutory language may reflect an attempt to clarify the meaning of a provision rather than change it. *Id.*; see also *Evans v Hebert*, 203 Mich App 392, 403; 513 NW2d 164 (1994).

[26] The *Boodt* Court opined that because no tolling was afforded in the presence of a defect pursuant to § 5856(d), the plaintiff's action was not commenced under § 2912b(1). *Boodt*, 481 Mich at 562-563. Our analysis today explains that the Legislature has made it clear that a defective NOI

We must again begin our analysis by examining the language of the statute itself. MCL 600.2912b states in relevant part:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
>
> (2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim was rendered.
>
> * * *
>
> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

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does not preclude tolling of the statute of limitations for cases bought under § 5856(c). As a result, whether a medical malpractice action is commenced for purposes of § 5856(a) does not depend on the presence or absence of defects within the NOI.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

* * *

(7) Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

(a) The factual basis for the defense to the claim.

(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

(8) If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

The plain language of § 2912b(1) mandates that a plaintiff shall not commence an action for medical malpractice without filing a timely NOI. Notably, however, the statute is silent regarding the consequences of filing a defective NOI. The statute makes no reference whatsoever to a mandatory dismissal penalty in the

event of a defect. Thus, our inquiry begins with whether a mandatory dismissal with prejudice under § 2912b was the intent of the Legislature. In the absence of an express directive within the statute itself, the legislative history of § 2912b, the statute's purpose, its placement within the broader statutory scheme, and a review of other relevant statutes are instructive guides.

A review of the legislative history reveals that the Legislature did not intend for a defect in an NOI to be grounds for dismissal with prejudice based on § 2912b. The clearest indication for this conclusion was the Legislature's complete rejection of a mandatory dismissal clause. The statute creating NOIs was originally introduced as Senate Bill 270 on January 28, 1993.[27] NOIs were codified in what was then proposed § 2912f. Section 2912d, a proposed companion to § 2912f, contained a mandatory dismissal penalty for failure to comply with § 2912f. The bill as introduced provided:

> Except as otherwise provided in this subsection, in an action alleging medical malpractice, *the court shall dismiss a claim not included in the notice required under section 2912f*. [Emphasis added.]

Significantly, this penalty provision did not have sufficient votes to pass. Mandatory dismissal was not the will of the Legislature. This Court has previously recognized that legislative history may be used to determine legislative intent. This Court previously held that "[w]here the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to

[27] This bill was introduced in the Senate by Senators DeGrow, Van Regenmorter, Gast, Cisky, Welborn, Wartner, Emmons, Schwarz, Ehlers, Geake, Arthurhultz, DiNello, Koivisto, Bouchard, Dunaskiss, Pridnia, and McManus.

authorize what the Legislature explicitly rejected."[28] We can draw no conclusion from the omission of the dismissal penalty in § 2912b other than it was not the intent of the Legislature to incorporate a mandatory dismissal penalty into § 2912b.

The stated purpose of § 2912b was to provide a mechanism for "promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . . ."[29] To hold that § 2912b in and of itself mandates dismissal with prejudice would complicate, prolong, and significantly increase the expense of liti-

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[28] *In re MCI Telecom Complaint*, 460 Mich at 415. Similarly, *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 140; 369 NW2d 277 (1985), held that the legislative history of a statute may be considered and, where it can be shown that certain language was affirmatively rejected, the court should not give the statute a construction that the Legislature plainly refused to give. As the Court explained in *In re MCI Telecom Complaint*:

> [W]e find the meaning of [MCL 484.2312a], standing alone, to be unambiguous on its face. The statutory language clearly requires that, should interLATA prohibitions be removed, Ameritech must provide intraLATA toll dialing parity. There is, however, nothing on the face of this statute, or within the language enacted by the Legislature, that would hold the reverse to be true. Indeed, where the Legislature specifically considered language authorizing such a linkage, and rejected it, the Court of Appeals clearly erred in holding that the statute inextricably linked intraLATA and interLATA toll dialing parity. [*In re MCI Telecom Complaint*, 460 Mich at 415-416.]

See also *Nation v WDE Electric Co*, 454 Mich 489, 492-493, 495; 563 NW2d 233 (1997); *Miller v State Farm Mut Automobile Ins Co*, 410 Mich 538, 566; 302 NW2d 537 (1981); and *People v Adamowski*, 340 Mich 422, 429; 65 NW2d 753 (1954).

[29] Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403 to 4406, March 22, 1993.

gation. Dismissal with prejudice would be inconsistent with these stated purposes.

Further, in determining legislative intent, we must look to § 2912b's context within the broader medical malpractice statutory scheme. To do so, we examine the statute as a whole. Our review of the medical malpractice legislation indicates that it was designed as a balanced scheme, imposing equivalent requirements on both plaintiffs and defendants. Both are required to participate in the NOI process and file comparable documents.[30] Both are required to file comparable affidavits to accompany complaints and answers.[31] Both are required to meet the same expert witness qualifications.[32] In light of these comparable and balanced requirements, the penalties should likewise be comparable. It is significant that the only penalty provision included in § 2912b is very minor: a shortening of the defendant's waiting period by 28 days.[33] In light of the minor penalty for a defendant, it would be inconsistent with the balanced approach in the legislative scheme to assume that the Legislature intended to impose on plaintiffs the harshest penalty possible: dismissal with prejudice.[34]

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[30] See MCL 600.2912b.

[31] See MCL 600.2912d and MCL 600.2912e.

[32] MCL 600.2169.

[33] MCL 600.2912b(8).

[34] Given the Legislature's clear rejection of dismissal as a penalty in § 2912b, and its amendment of § 5856(d), we question whether the Legislature ever intended § 5856(d) to preclude tolling of the statute of limitations in the presence of defects in an NOI. The timing of the amendment, the language chosen, and the legislative history support the conclusion that the change was intended to be a clarification of the original intent of the statute rather than it being representative of a change from the original intent. Accordingly, we question whether *Roberts I* and *Boodt* were correctly decided, as they failed to consider the entire legislative scheme and the legislative history involved. However,

In determining legislative intent, we should also consider other relevant statutory provisions. To that end, we consider the Revised Judicature Act (RJA) to see if other appropriate remedies exist that are consistent with the intended purpose of § 2912b. We have long recognized that the RJA does provide a mechanism to cure certain defects within pleadings in MCL 600.2301. We note that the language of § 2301 goes beyond the limited concept of amendment of "pleadings" and allows for curing of certain defects in any "process, pleading or proceeding."

MCL 600.2301 states:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

Service of an NOI is clearly part of a medical malpractice "process" or "proceeding" in Michigan.[35] Section 2912b mandates that "an action alleging medical malpractice" in Michigan "shall not commence . . . unless the person has given the health professional or health facility written notice . . . ."[36] Since an NOI must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice

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because the NOI and filing in this case occurred after 2004, this issue is not before us, and we will refrain from deciding this issue in the present case.

[35] See *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004) (*Roberts II*) ("[W]e acknowledge that the notice of intent is provided at the earliest stage of a medical malpractice *proceeding*.") (emphasis added); *Boodt*, 481 Mich at 561.

[36] MCL 600.2912b(1).

"proceeding." As a result, § 2301 applies to the NOI "process."[37] As Justice CAVANAGH opined in his dissent in *Boodt*, this Court has for several decades applied MCL 600.2301 or its predecessor (which contained nearly identical language) to allow amendment of documents that, although not aptly characterized as pleadings, might well fall under the broad category of a "process" or "proceeding."[38] Accordingly, we hold that § 2301 may be employed to cure defects in an NOI.

We recognize that § 2301 allows for amendment of errors or defects, whether the defect is in form or in substance, but only when the amendment would be "for the furtherance of justice." Additionally, § 2301 mandates that courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties. Thus, the applicability of § 2301 rests on a two-pronged test: first, whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice. If both of these prongs are satisfied, a cure will be allowed "on such terms as are

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[37] We note that the majority in *Boodt* engaged in some limited discussion of § 2301 in a footnote. *Boodt*, *supra* at 567 n 4. However, as we previously indicated, the *Boodt* majority did not reach this issue in light of its holding that, because the NOI was deficient, no action was pending, and § 2301 only applies to pending actions. Again, as this analysis is based on the former § 5856(d), it is no longer applicable.

[38] *Boodt*, 481 Mich at 567-572 (CAVANAGH, J., dissenting); see also *Tudryck v Mutch*, 320 Mich 99, 107; 30 NW2d 518 (1948) (applying the predecessor statute of MCL 600.2301 to allow amendment of a settlement agreement); *Fildew v Stockard*, 256 Mich 494, 498-499; 239 NW 868 (1932) (applying the predecessor statute of MCL 600.2301 to allow amendment of an affidavit for a writ of garnishment that was required to be filed before commencement of that action); *Hopkins & Son v Green*, 93 Mich 394, 395-396; 53 NW 537 (1892) (applying the predecessor statute of MCL 600.2301 to allow amendment of a bond); *Bole v Sands & Maxwell Lumber Co*, 77 Mich 239, 241-242; 43 NW 873 (1889) (holding that a summons could be amended pursuant to the "process, pleading or proceeding" language of the predecessor statute of MCL 600.2301).

just."[39] Given that NOIs are served at such an early stage in the proceedings, so-called "defects" are to be expected. The statute contemplates that medical records may not have been turned over before the NOI is mailed to the defendant.[40] Defendants who receive these notices are sophisticated health professionals with extensive medical background and training. Indeed, these same defendants are allowed to act as their own reviewing experts. A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the NOI. Accordingly, we conclude that no substantial right of a health care provider is implicated. Further, we hold that the second prong of the test, which requires that the cure be in the furtherance of justice, is satisfied when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Thus, only when a plaintiff has not made a good-faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice.

We must now turn to the instant NOI to determine the nature of the defect and whether § 2301 may be invoked. The NOI is 13 pages long. Plaintiff made a good-faith attempt to address each of the subsections enumerated in § 2912b(4). The Court of Appeals held, and we agree, that the vast majority of plaintiff's NOI was in compliance with § 2912b(4).[41] The Court of Appeals held that the NOI was defective with respect to

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[39] MCL 600.2301.

[40] MCL 600.2912b(5) provides for the exchange of medical records.

[41] The court found no defects with regard to the claims against the individually named doctors, the vicarious liability claims against West Michigan Cardiovascular Surgeons, and the vicarious liability claims against Spectrum Health for Heiser and Shabahang.

the claims made against defendant West Michigan Cardiovascular for direct liability for training and supervision, and also with respect to the claims for direct liability asserted against Spectrum Health for its nurses and physician's assistants. In analyzing these defects, the Court of Appeals stated:

> Plaintiff's notice does not adequately address the standard of care applicable to [West Michigan] Cardiovascular under a direct theory of liability for failure to properly train or hire. The notice merely provides that [West Michigan] Cardiovascular should have hired competent staff members and properly trained them. But the notice identifies no relevant standard for determining competency or properly training staff persons. Nor can the standard be gleaned from the other sections of the notice: plaintiff failed to state how [West Michigan] Cardiovascular's hiring and training practices violated that standard, failed to state which hiring practices or training methods it should have employed, and failed to state how those improper practices proximately caused Bush's injuries. For this reason, to the extent that plaintiff's claims rest on these theories, the trial court should have granted summary disposition in favor of [West Michigan] Cardiovascular.
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> * * *
>
> Although plaintiff's notice alleges errors on the part of Spectrum Health's nursing staff and physician assistants, the notice does not purport to state a separate standard of care for the nurses and physician assistants. This problem is compounded by the fact that the notice does not delineate the specific actions taken by the nursing staff or physician assistants that purportedly breached the standard of care. Rather, plaintiff's notice generally asserts that the staff should have performed monitoring, charting, assessing, and reporting and engaged in advocacy for the patient and otherwise challenged the actions of physicians. Finally, the notice does not state the manner in which the identified breaches

> proximately caused Bush's injuries. Thus, even when the notice is read as a whole, it does not adequately address the standard of care applicable to Spectrum Health's staff other than Heiser and Shabahang. For that reason, we agree with Spectrum Health that the trial court erred when it concluded that plaintiff's notice met the minimum requirements of MCL 600.2912b(4)(b) with regard to Spectrum Health's nursing staff and physician assistants. Likewise, to the extent that plaintiff purported to give notice that Spectrum Health could be held directly liable for Bush's injuries on the basis of the theories that it negligently hired or failed to train its staff, for the same reasons we explained with regard to [West Michigan] Cardiovascular, we conclude that the notice did not meet the requirements of MCL 600.2912b.[42]

We agree with the Court of Appeals that these omissions do constitute defects in the NOI. However, we disagree with the Court of Appeals regarding the appropriate remedy. We are not persuaded that the defects described by the Court of Appeals warrant dismissal of a claim. These types of defects fall squarely within the ambit of § 2301 and should be disregarded or cured by amendment. It would not be in the furtherance of justice to dismiss a claim where the plaintiff has made a good-faith attempt to comply with the content requirement of § 2912b. A dismissal would only be warranted if the party fails to make a good-faith attempt to comply with the content requirements.[43] Accordingly, we hold that the alleged defects can be cured pursuant to § 2301 because the substantial rights of the parties are not affected, and "disregard" or "amendment" of the defect is in the furtherance of justice when a party has made a

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[42] *Bush*, 278 Mich App at 711, 716-717 (citations omitted).

[43] See defendant's response to plaintiff's NOI, at pp. 182-183 of this opinion, which provides an example of a failure to demonstrate a good-faith attempt to comply with the content requirements.

good-faith attempt to comply with the content provisions of § 2912b.[44]

C. MCL 600.2912b(7) AND DEFECTIVE RESPONSES TO AN NOI

Next, given that the Court of Appeals held that Shabahang's response to plaintiff's NOI was defective because it did not meet the requirements of MCL 600.2912b(7), the question arises whether plaintiff was required to wait the full 182-day period before filing his medical malpractice action, or whether he could avail himself of the shortened 154-day period. Our analysis again begins by examining the text of MCL 600.2912b(7).[45] The statute is clear that a defendant must provide the plaintiff with a written response within 154 days of receipt of the NOI. This provision is mandatory. The response must include a statement of the factual basis for the defense, the standard of care that the health professional claims applies, the manner in which it is claimed that the health professional complied with the standard of care, and the manner in which the health professional contends that the alleged negligence was not the proximate cause of the plaintiff's injuries. If the plaintiff does not receive the written response required under MCL 600.2912b(7) within the 154-day waiting period, the plaintiff may file suit after the 154-day waiting period has expired.[46]

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[44] MCL 600.2301 provides that any amendment shall be made "on such terms as are just." We note that in light of this provision, justice would be served by having any amendment relate back to the time that the original NOI was mailed, in accord with the treatment afforded to pleadings when amended under MCR 2.118(D).

[45] See part III(B) of this opinion for the full text.

[46] MCL 600.2912b(8) provides: "If the claimant does not receive the written response required under subsection (7) within the required

According to the Court of Appeals, Shabahang's response was defective and did not comply with the statute. Despite this response, Shabahang argues that plaintiff was still required to wait the full 182-day waiting period before filing suit because plaintiff received a response to the NOI. Plaintiff, on the other hand, argues that because the notice did not meet the requirements of § 2912b(7), it was proper to commence his suit upon the expiration of the 154-day period, as allowed under MCL 600.2912b(8). Shabahang counters that plaintiff could not unilaterally determine that the response was inadequate, contending that a judge must adjudicate the issue before plaintiff may file the complaint early.

Once again we turn to the standards set forth in § 2301 for guidance. Section 2301 similarly allows for "amendment" or "disregard" of defects in responses to NOIs, as long as the cure is in the furtherance of justice and does not affect the substantial rights of the parties. Significantly, defendants must make a good-faith attempt to comply with the content requirements of the statute to avail themselves of § 2301.

Shabahang's one-page response to the NOI was utterly lacking in a good-faith attempt to comply. The entire substantive portion of Shabahang's response stated:

> 1. FACTUAL BASIS FOR DEFENSE TO CLAIM
>
> The medical records involved in this case, together with deposition testimony, will form the primary defense to this case. Briefly, Dr. Shabahang contends that he

154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period."

We note that our holding today does not conflict with *Omelenchuk v City of Warren*, 461 Mich 567, 575; 609 NW2d 177 (2000) (holding that the statute of limitations remains tolled for the full 182 days even if the plaintiff takes advantage of the shortened waiting period).

properly evaluated, assessed and treated Gary Bush. The actions of Dr. Shabahang were well within the standard of care.

2. STANDARD OF CARE AND COMPLIANCE

The standard of care required Dr. Shabahang to do things demonstrated in the medical records, which may be further augmented by deposition testimony. At all times, he acted within the standards of care in his care and treatment of Gary Bush.

3. MANNER OF COMPLIANCE

See § 2 above. The manner in which Dr. Shabahang complied with the applicable standard of care is outlined in the medical records, and will be further augmented by sworn deposition testimony.

4. PROXIMATE CAUSE

It is the position of Dr. Shabahang that his actions did not within a reasonable degree of medical probability contribute in any way to the complications alleged by Gary Bush. Additionally, it is the position of Dr. Shabahang that the current medical condition of Gary Bush was not in any way caused or contributed by the activities of Dr. Shabahang.

Shabahang was required to make a general statement of the factors contained in § 2912b(7). He failed to do so. Shabahang's response is nothing more than a blanket denial of any wrongdoing. Indeed, Shabahang himself does not defend his efforts or the content of the response in his arguments to this Court. Rather, defendant takes the position that the content of the response is irrelevant. We disagree. The purpose of the NOI waiting period is to provide a cost-saving method to

resolve meritorious claims. If a defendant does not wish to use that process, the plaintiff is entitled to accelerate the filing of the complaint. A defendant can either advise the plaintiff of the decision to waive[47] or the defendant may do nothing at all, either of which triggers the shortened waiting period. However, we cannot allow a defendant to so flagrantly disregard the process and fail to make a good-faith attempt to comply, yet still take advantage of the full waiting period. As Shabahang did not make a good-faith attempt to comply with § 2912b(7), he cannot avail himself of either § 2301 or the full 182-day waiting period.

This result is fully consistent with the statutory NOI scheme. It makes little sense to continue a settlement period when one party has indicated that he or she has no interest in settlement. When a defendant has made little or no attempt to comply with the statute, we will not afford the same benefits as if he or she had made an attempt to comply.

Finally, defendant asserts that plaintiff does not have the right to unilaterally make a determination on the validity of a response. We agree with the Court of Appeals that a plaintiff who unilaterally makes such a decision does so at his or her own peril. If a court ultimately determines that the response is not defective, plaintiff's complaint may be deemed untimely. However, given the limited time period involved, it would be virtually impossible for a Court to adjudicate this issue on a timely basis. By the time the parties could schedule a hearing and brief the issue, the shortened time period afforded by § 2912b would be lost. Therefore, we agree with the Court of Appeals that a plaintiff may choose to make his own determination

[47] See MCL 600.2912b(9).

regarding the sufficiency of a response, but he does so at the risk of having a court later determine that the defendant's response was indeed adequate. We conclude that § 2912b(7) allows a plaintiff to file a complaint early if the defendant's response to the NOI is defective.

IV. CONCLUSION

We hold that pursuant to MCL 600.5856(c), as amended by 2004 PA 87, effective April 22, 2004, when an NOI is timely, the statute of limitations is tolled despite defects contained therein. Moreover, in light of the legislative clarification of § 5856(c), we hold that the purpose of the NOI statute is better served by allowing for defects in NOIs to be addressed in light of § 2301, which permits "amendment" or "disregard" of "any error or defect" where the substantial rights of the parties are not affected, as long as the cure is in the furtherance of justice and on terms that are just. A cure is in the furtherance of justice when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Finally, we hold that a plaintiff may take advantage of the 154-day waiting period provided in § 2912b(8) where a defendant fails to make a good-faith attempt to reply to the plaintiff's NOI in compliance with the statutory content requirements.

We therefore affirm the Court of Appeals in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

KELLY, C.J., and CAVANAGH, and WEAVER, JJ., concurred with HATHAWAY, J.

MARKMAN, J. (*dissenting*). Because I disagree with the majority's interpretation of the notice-tolling provision in MCL 600.5856, as well as with its interpretation of

MCL 600.2912b regarding a defendant's permissible response to a plaintiff's notice of intent to sue, I respectfully dissent.

I. FACTS AND HISTORY

Plaintiff underwent surgery on August 7, 2003, for an aortic aneurysm and a heart valve replacement. Plaintiff alleges that during the surgery defendant Behrooz-Bruce Shabahang, M.D., "cut into the aortic aneurysm causing a laceration" and defendant John Charles Heiser, M.D., "improperly clamped [a] vessel causing vascular damage." Defendants George T. Sugiyama, M.D., and M. Ashraf Mansour, M.D., "were called in to repair the vein and artery." Plaintiff alleges that the injuries caused by the surgery have caused him to become "unable to live without supervision and assistance."

On August 5, 2005, two days before the two-year period of limitations expired, plaintiff served defendants, including Spectrum Health Butterworth Campus (the facility where the surgery took place), West Michigan Cardiovascular Surgeons (the entity to which Shabahang and Heiser belonged), and Vascular Associates, P.C. (the entity to which Sugiyama and Mansour belonged), with notices of intent to file suit. Shabahang responded to plaintiff's notice, as did Sugiyama, Mansour, and Vascular Associates, but Heiser, Spectrum Health, and West Michigan Cardiovascular did not. On January 27, 2006, 175 days after serving notice, plaintiff filed his complaint against all defendants.

The trial court granted summary disposition in favor of Sugiyama, Mansour, and Vascular Associates because plaintiff's notice did not include a standard of care for

Sugiyama and Mansour.[1] For that same reason, the trial court granted partial summary disposition in favor of Spectrum Health for its alleged liability based on Sugiyama's and Mansour's alleged malpractice.[2] The trial court, however, did not grant summary disposition in favor of Shabahang, who argued that the complaint was filed prematurely.

The Court of Appeals initially denied leave to appeal but, after remand by this Court, 477 Mich 934 (2006); 477 Mich 935 (2006), issued an opinion affirming in most respects the trial court's decision regarding the sufficiency of plaintiff's notice. *Bush v Shabahang*, 278 Mich App 703; 753 NW2d 271 (2008). The Court of Appeals, however, held that the notice was defective for the direct liability claims against Spectrum Health and West Michigan Cardiovascular Surgeons, which were based on their alleged failure to properly hire and train staff. With respect to those claims, the Court remanded for dismissal without prejudice, concluding that the statute of limitations had been tolled by the defective notice and that the "applicable limitations periods remain tolled until entry of the grants of summary disposition." *Id.* at 727. With respect to the timing of plaintiff's complaint, the court held that plaintiff's complaint was timely filed, although Judge FITZGERALD would have held that plaintiff was required to wait 182 days after giving notice before commencing the suit. *Id.* at 727-729 (FITZGERALD, P.J., concurring in part and dissenting in part).

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[1] Plaintiff did not appeal this decision and thus it is not before the Court.

[2] The court also granted summary disposition in favor of Spectrum Health on the negligence claims based on Spectrum Health's physician's assistants because plaintiff failed to file a conforming affidavit of merit with those claims.

This Court consolidated these cases and initially heard oral argument on defendants' applications for leave to appeal regarding: (1) whether the Court of Appeals' remand for dismissal without prejudice was inconsistent with *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008); and (2) whether plaintiff's complaint was filed prematurely. 482 Mich 1014 (2008). During oral arguments, a question arose regarding the 2004 amendment of the tolling statute, MCL 600.5856. Accordingly, we granted leave to hear full oral argument as follows:

> (1) whether the plaintiff's defective notice of intent as to defendants West Michigan Cardiovascular Surgeons and Spectrum Health tolled the period of limitations pursuant to MCL 600.5856(c), as amended by 2004 PA 87, effective April 22, 2004; and (2) whether defendant Shabahang's defective response to the plaintiff's notice of intent, MCL 600.2912b(7), was presumed valid such that the plaintiff was required to wait the full 182-day period before filing his medical malpractice action. [482 Mich 1105 (2008).]

II. STANDARD OF REVIEW

This Court reviews questions regarding summary disposition "de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review questions of statutory interpretation de novo. *Miller v Mercy Mem Hosp*, 466 Mich 196, 201; 644 NW2d 730 (2002).

III. TOLLING STATUTE

A. ANALYSIS

A claim for medical malpractice must be brought within two years from the time the alleged malpractice

takes place.[3] *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). A claimant, however, can toll this limitations period by complying with MCL 600.5856.[4] Specifically, § 5856(c) allows tolling during the interlude to commencing a medical malpractice action required by § 2912b if the statute of limitations would otherwise expire during that period.[5] Absent tolling, however, an action commenced after two years is "barred." MCL 600.5838a(2). Accordingly, for plaintiff's claims to survive summary disposition, the statute of limitations must have been tolled, because plaintiff filed his complaint more than two years and five months from the date of the alleged malpractice.

MCL 600.5856(c) provides:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days

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[3] The statute of limitations for medical malpractice claims provides that a person "shall not bring or maintain an action to recover damages for injuries to persons or property unless . . . the action is commenced within [2 years]." MCL 600.5805(1) and (6).

[4] Tolling extends the time during which a claim can be brought by temporarily suspending the statute of limitations.

[5] MCL 600.2912b(1) states:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

remaining in the applicable notice period after the date notice is given.[6]

Previously this provision read:

> The statutes of limitations or repose are tolled:
>
> * * *
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b. [MCL 600.5856(d).][7]

In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64-66; 642 NW2d 663 (2002) (*Roberts I*), this Court held that in order to toll pursuant to the pre-amendment provision, plaintiff's notice must comply with MCL 600.2912b(4).[8] The instant question is whether under the post-amendment provision, the notice must also comply with § 2912b(4). The majority holds that under

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[6] Generally, this is known as the notice-tolling provision.

[7] 2004 PA 87 amended MCL 600.5856. The amendment deleted previous subsection (c).

[8] MCL 600.2912b(4) states:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

the amended notice-tolling provision a defective notice, i.e., one that does not satisfy § 2912b(4), will nonetheless toll the statute of limitations. I do not agree and believe instead that the notice-tolling provision still requires a notice that is compliant with § 2912b(4) in order to effectively toll.

The Court's obligation in interpreting a statute is to "give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). "[L]anguage does not stand alone, and thus it cannot be read in a vacuum. Instead, 'it exists and must be read in context with the entire act . . . .' " *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole" to fully reveal the Legislature's intent. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007); see also *Turnbull v Prentiss Lumber Co*, 55 Mich 387, 394; 21 NW 375 (1884). The notice-tolling provision and the notice statute, § 2912b, are *in pari materia* because the notice-tolling provision was enacted with § 2912b, see 1993 PA 78, and directly references § 2912b. Accordingly, the notice-tolling provision must be interpreted in light of the overall statutory scheme within which it was placed.

The notice-tolling provision tolls "[a]t the time notice is given in compliance with the applicable notice period under section 2912b." The applicable notice period

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(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

under § 2912b is 182 days from the filing of the notice during which a complaint may not be filed, MCL 600.2912b(1); *Omelenchuk v City of Warren*, 461 Mich 567, 573; 609 NW2d 177 (2000), and only begins once "the person has given the health professional or health facility written notice under this section," MCL 600.2912b(1). Notice is only considered "written notice under this section" if it complies with § 2912b(4), which states that "notice . . . under this section shall contain a statement" regarding substantive aspects of the alleged malpractice. See *Boodt*, 481 Mich at 562-563 ("[A] plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4)."). For the notice to be given in compliance with the "applicable notice period," that period necessarily must exist. Because giving notice as required by § 2912b(4) constitutes the only manner by which the applicable notice period is brought into existence, it seems logical to conclude that the Legislature intended the notice-tolling provision to be triggered only by the plaintiff filing such notice.

Furthermore, allowing the notice-tolling provision to be triggered by a *defective* notice makes little sense considering that the provision only applies "if during [the applicable notice period] a claim would be barred by the statute of limitations." MCL 600.5856(c). One cannot fairly say that a claim would be barred "during" the notice period when the notice period has not begun due to the plaintiff's failure to file a sufficient notice. Further, the tolling period is equal to the "number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). Because a defective notice does not create an applicable notice period under § 2912b(1), the number of days remaining in that period cannot be determined. Thus, if a defective notice is allowed to toll, the notice-tolling provision

would provide no guidance for determining the tolling period. The only manner by which the notice-tolling provision can be given meaningful effect is to interpret it as requiring the notice specifically contemplated in § 2912b(4), which creates the applicable notice period to which the tolling provision repeatedly refers. Accordingly, contrary to the majority, I believe that a defective notice cannot toll the statute of limitations under § 5856(c).

Here, plaintiff's notice was defective because it did not contain any statement regarding the standard of care for claims alleging direct liability against West Michigan Cardiovascular and Spectrum Health. Plaintiff's failure to include any statement regarding the standard of care for Sugiyama's and Mansour's alleged malpractice also makes the notice defective for vicarious liability claims against Spectrum Health based upon their malpractice. Because plaintiff's notice was defective in this regard, the statute of limitations for those claims was not tolled by § 5856(c). Moreover, because the statute of limitations was not tolled, and because plaintiff's complaint was filed more than two years after the alleged malpractice, these claims are time-barred and should be dismissed with prejudice.

B. RESPONSE TO THE MAJORITY

The majority's interpretation is at odds with its own assertion that "[t]he statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme." *Ante* at 167. By focusing only on the amended language in the notice-tolling provision's first clause, the majority disregards the implications of the remaining portion of the provision. *Ante* at 169-170. Such an analysis is incomplete in light of the direct correlation that the remaining portion of the

provision has with § 2912b and its notice period. Although the legislative amendment may only have altered parts of § 5856(c), the *whole* scheme nonetheless must be considered in order to determine the Legislature's intent. The numerous references to the notice period in § 5856(c) necessarily mean that the period established by § 2912b(1) must have *come into being in the first place* for those references to be given any effect, and this can only take place when notice that complies with § 2912b(4) has been supplied. The majority, however, interprets the notice-tolling provision in a manner that bears no logical relationship with the statute that requires that notice be given in the first place. Thus, rather than adopting an interpretation that "works in harmony with the entire statutory scheme," the majority instead adopts an interpretation that raises an insoluble tension between the tolling provision and the notice statute that will only be resolved by years of litigation, which perhaps is the whole point of the majority's exercise.

This tension arises most clearly in the form of MCL 600.2301, which the majority employs to sustain its conclusion that a defective notice can toll the statute of limitations, because a court can thereby "disregard any error or defect" in the notice. MCL 600.2301 provides:

> The court in which any action or proceeding is *pending*, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties. [Emphasis added.]

Without reference to any language from the tolling or notice statutes, the majority ascertains that a "good-

faith attempt to comply with the content requirements of § 2912b" allows tolling under § 5856(c), *ante* at 178, because any defect "should be disregarded or cured by amendment," *ante* at 180.

As this Court explained in *Boodt*, 481 Mich at 563 n 4, "§ 2301 only applies to pending actions." As discussed above, § 2912b(1) provides that a person "shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." Section 2912b(4) states that the "notice given to a health professional or health facility under this section shall contain a statement of at least all of the following . . . ." Therefore, "a plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4)." *Boodt*, 481 Mich at 562-563. An action is not "pending" if it cannot be "commenced," and § 2912b(1) clearly prohibits a plaintiff from commencing an action before giving sufficient notice. I would not allow a plaintiff who is out of compliance with § 2912b, and thus not in compliance with the medical malpractice reforms enacted by our Legislature, to take advantage of the amendment provision. Accordingly, § 2301 is inapplicable, and a plaintiff cannot retroactively "amend" the notice of intent, and the courts cannot "disregard any error or defect" in the notice of intent.

Although I disagree in almost all respects with the majority's analysis regarding the amended notice-tolling provision, I note in particular the following difficulties with this analysis:

(1) The majority states that it "cannot assume that language chosen by the Legislature is inadvertent" or

that a "change means nothing at all." *Ante* at 169-170. Why exactly is "interpret[ing] the amended statute in the same manner [as] . . . the pre-amendment statute" something that this Court "cannot do"? *Ante* at 169. The beginning point for interpreting a statute must always be its language. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). Even after an amendment, the statute must continue to control, because it constitutes the law of this state. In light of the majority's position that any amendment must exact some change in meaning, what choice does the Legislature have if it wishes to make minor amendments to clarify a certain portion of a statute *consistent* with the Court's interpretation? The majority's position is especially dubious when the Legislature, as it did here, makes minor changes to one part of a statute at the same time that it makes major changes to another part.[9]

> While in many and perhaps most instances it undoubtedly is the legislative intent, in enacting an amendment, to change existing law, there are, as undoubtedly, other instances, particularly if uncertainty exists as to the meaning of a statute, when amendments are adopted for the purpose of making plain what the legislative intent had been all

[9] The major change made to MCL 600.5856 was the amendment to the provision that begins tolling when a complaint is filed. That provision now states that "[t]he statutes of limitation or repose are tolled . . . [a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." MCL 600.5856(a). Previously, the statute of limitations was tolled "[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant." The amendment also completely deleted previous subsection (c), which allowed tolling when the complaint was filed and "placed in the hands of an officer for immediate service." This reflects the Legislature's focus on returning complaint tolling to the way it previously operated, which *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), found inconsistent with the pre-amendment version of § 5856(a).

> along from the time of the statute's original enactment. [*Detroit Edison Co v Janosz*, 350 Mich 606, 614; 87 NW2d 126 (1957).]

Indeed, it seems most reasonable that the Legislature's minimal changes to the notice-tolling provision were intended only to clarify the precise moment at which the statute of limitations would be tolled. The pre-amendment version, by stating that the "statutes of limitations or repose are tolled . . . [i]f, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose," MCL 600.5856(d), clearly described the circumstances by which the statute of limitations could be tolled, but was less clear regarding at what point in time the tolling actually began. Conversely, the other tolling provisions did not suffer from this same infirmity by stating that the "statutes of limitations or repose are tolled . . . [a]t the time" a specific action occurred. See pre-amendment MCL 600.5856(a) through (c). With this amendment, the Legislature changed the notice-tolling provision so that it too now states that the tolling starts "[a]t the time" the specified action occurs. In light of the identity to the other tolling provisions created by the amendment, I believe the amendment is best interpreted as effecting the same meaning that the identical language carries. Adding the phrase "[a]t the time" clearly denotes that the tolling begins upon the occurrence of the specified act. Interpreting the amendment as such clarification does not render it "inadvertent." *Ante* at 169. Instead, this recognizes that the Legislature sought to enhance the clarity of the notice-tolling provision to the level of the other provisions and did so through a minor alteration.

(2) The majority creates a new standard for determining whether a notice complies with § 2912b(4) by

stating: "A defendant who has enough medical expertise to opine in his or her own defense certainly has the ability to understand the nature of claims being asserted against him or her even in the presence of defects in the NOI." *Ante* at 178. This new subjective standard based on the defendant's "medical expertise" is not only divorced from the statute, but it is also inconsistent with the current standard set forth in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004) (*Roberts II*): "[T]he claimant is required to . . . provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." (Emphasis in original.) The majority thereby clumsily disposes of a standard that required a plaintiff to comply with *all* the statutory requirements in favor of one that requires the plaintiff to follow the law only to the extent that the court believes a defendant's "medical expertise" can fill the gaps of the plaintiff's noncompliance, all without explaining even perfunctorily why the new standard is consistent with the law *actually* enacted by the Legislature, as opposed to the statute the majority *wishes* had been adopted.

(3) The majority's amendment process allows a plaintiff to commence his action 182 days after giving defective notice despite the fact that § 2912b(1) disallows a plaintiff from commencing suit unless he has given "written notice under this section." In other words, the majority has rewritten § 2912b(1) to enable a plaintiff to commence his suit 182 days after giving defective notice if it manifests the plaintiff's "good-faith attempt to comply with § 2912b(4)." *Ante* at 178. Cf. *Roberts I*, 466 Mich at 66 (holding that a "plaintiff must fulfill the preconditions of § 2912b(4) in order to maintain a medical malpractice action"). By this revision, the ma-

jority rejects the Legislature's intention that notice "shall contain [specific] statement[s]" and substitutes its own goal of allowing plaintiffs to commence their actions despite obvious omissions that completely frustrate the purpose of the legislative notice procedure.[10] The majority never explains how the *tolling statute* amendment compels this rewriting of the *notice statute*, most likely because no valid explanation exists. The majority cannot cite anything in the amendment that altered the clear language in § 2912b(1), nor can it cite anything that indicates the Legislature intended that such language be ignored.

(4) The majority questions in dictum "whether *Roberts I* and *Boodt* were correctly decided" based on its interpretation of the amended notice-tolling provision, *ante* at 175 n 34, even after acknowledging that those cases "relied on language of a statute that is no longer in existence," *ante* at 166. The majority's disagreement with *Boodt* seems to be based largely on its misunderstanding of that decision. *Boodt* held that a plaintiff's complaint does not toll the statute of limitations pursuant to § 5856(a) after defective notice has been given, because § 2912b(1) disallows a plaintiff from commencing an action unless the plaintiff has given "written notice under this section." *Boodt*, 481 Mich at 564. The majority, however, interprets *Boodt* as holding that "no

[10] The majority provides no guidance regarding how lower courts should evaluate "good faith," beyond the dubious guidance afforded by its conclusion in this case that plaintiff's notice meets this threshold even though the majority agrees that plaintiff wholly omitted the statements required by § 2912b(4)(b) through (e) for direct liability claims against Spectrum Health and West Michigan Cardiovascular and those required by § 2912b(4)(b), (c), and (e) for vicarious liability claims against Spectrum Health. *Ante* at 178-180, citing 278 Mich App at 711, 716-717. The only real guidance that can be gleaned from this conclusion is that the Legislature's words are no longer much relevant to understanding the law of this state.

tolling was afforded in the presence of a defect pursuant" to the notice-tolling provision, and thus "the plaintiff's action was not commenced under § 2912b(1)." *Ante* at 170 n 26. Thus, notice-tolling was never an issue in *Boodt*, yet the majority inexplicably finds that its interpretation of the notice-tolling provision throws *Boodt* into question. As for *Roberts I*, the majority never explains any possible errors in that decision other than to say that it "opined," rather than "held," that "the focus of § 5856(d) was on compliance with § 2912b in its entirety." *Ante* at 169. The majority thus attempts to diminish the validity of *Roberts I* by characterizing this decision as simply an expression of one possible opinion among many, rather than actually analyzing the law in any coherent manner to demonstrate why *Roberts I* may be incorrect.[11] Although the majority makes clear that it disagrees with the results reached in *Roberts I* and *Boodt*, it does not deign to explain why the law does not support those results.

(5) By finding that § 2912b "is silent regarding the consequences of filing a defective NOI" and "makes no reference whatsoever to a mandatory dismissal penalty in the event of a defect," the majority raises an irrelevant issue concerning "whether a mandatory dismissal with prejudice under § 2912b was the intent of the Legislature." *Ante* at 172-173. However, this Court has never held that a defective notice alone requires "mandatory dismissal with prejudice." By phrasing its in-

[11] The Court's decision in *Roberts I* that the pre-amendment notice-tolling provision required notice compliant with § 2912b to toll was supported by all seven justices, including three currently in the majority who now question it. See *Roberts I*, 466 Mich at 67; *id*. at 72 (KELLY, J., dissenting) ("[T]o begin the tolling of the MCL 600.5856(d) statute of limitations, a plaintiff must fully comply with the requirements of MCL 600.2912b.").

quiry as it does, the majority obviously misapprehends the procedure by which plaintiff's claims were dismissed.

First, the majority overlooks the interplay between the statute of limitations and the notice-tolling provision. The Legislature clearly created a two-year limitations period for medical malpractice actions, and then clearly stated that an action cannot be commenced after that period has expired. It also clearly created a tolling provision that allows the limitations period to be suspended if a claimant gives notice pursuant to § 2912b. If notice is not given, then tolling is not triggered. If tolling is not triggered and the statute of limitations expires, the latter operates in the same manner that it does in every other action: it bars claims from being commenced after its expiration.

Second, even if a defective notice does not toll the statute of limitations, this Court has never held that the defect requires "mandatory dismissal *with prejudice*." *Ante* at 173 (emphasis added).[12] In fact, current caselaw supports the exact opposite proposition, namely that a plaintiff filing a defective notice can avoid dismissal with prejudice by simply correcting the notice so that it complies with § 2912b(4) before the statute of limitations has expired. In *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 3; 704 NW2d 69 (2005), this Court held that "a second notice of intent to sue, sent with fewer than 182 days remaining in the limitations period, can initiate tolling under § 5856(d) as long as the first notice of intent to sue did not initiate such tolling." Thus, under

[12] This Court has held that "dismissal is an appropriate remedy for noncompliance with the notice provisions." *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005). Whether the dismissal is *with prejudice* depends on whether the plaintiff can "still comply with the applicable statute of limitations." *Id.*

these circumstances, nothing would bar a claimant from filing a second notice to take advantage of the notice-tolling provision.

Here, rather than not tolling because there were more than 182 days remaining in the limitations period, plaintiff's notice, filed within the last 182 days of the limitations period, did not toll because it was *defective*. Although plaintiff only had two days in which to correct the defects, had he done so within that time, the statute of limitations would have been tolled and he could have timely commenced his action after the 182-day waiting period. Thus, any time a defective notice is filed, the plaintiff always has the opportunity to revise the notice to comply with § 2912b(4), at least until the expiration of the statute of limitations, and the defect alone does not mandate dismissal with prejudice.

(6) Without regard to the fact that a provision for "mandatory dismissal with prejudice" is unnecessary in § 2912b due to the dismissal necessitated by the statute of limitations, the majority proceeds with its misguided, and fruitless, search for direction from the Legislature that a defective notice requires "mandatory dismissal with prejudice." Unsurprisingly, the majority finds no such mandate, but rather concludes that the Legislature rejected a "mandatory dismissal" based on its interpretation of a provision of the initial notice legislation that the Legislature never adopted. *Ante* at 173.

Although "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted" may constitute a legitimate form of legislative history, *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), the majority's use of it here exemplifies well the shortcomings inherent in such approach. To reasonably discern legislative intent from rejected language,

the rejected provision should be considered as a whole, rather than partially as the majority does by only looking at the first sentence of the provision. The full provision stated:

> Except as otherwise provided in this subsection, in an action alleging medical malpractice, the court shall dismiss a claim not included in the notice required under section 2912f. This subsection does not apply to a claim that results from previously unknown information gathered during discovery.

As an initial matter, this seems entirely unrelated to the statute of limitations under which dismissal is granted. The Legislature's rejection of an unrelated provision can hardly be used to alter the clear meaning of a statute. It seems far more reasonable to conclude that the Legislature rejected this provision in favor of § 2912b(3), which provides for similar treatment of the same subject matter: undiscovered claims.[13] Rather than considering *this* to be the Legislature's rationale for rejecting the initial provision, the majority concludes that it "can draw no conclusion from the omission . . . other than it was not the intent of the Legislature to incorporate a mandatory dismissal penalty into § 2912b." *Ante* at 174. Most other observers of this same legislative history would without much difficulty be able to draw "another conclusion," and would almost certainly be far closer to reality than the majority. How can the majority draw an informed conclusion concerning legislative history from a provision *never* enacted

[13] MCL 600.2912b(3) provides a shortened notice period for a claim not in the initial notice only if the plaintiff "did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent" before filing the complaint against the other parties.

without even considering a provision that *has* been enacted and actually substituted for the never-enacted provision?

(7) The majority concludes that "[t]o hold that § 2912b in and of itself mandates dismissal with prejudice . . . would be inconsistent with" § 2912b's "stated purpose of . . . 'promoting settlement . . . .' " *Ante* at 174-175 (citation omitted). However, the majority does not explain how allowing a defective notice to substitute for the notice required by § 2912b(4) in any way " 'promot[es] settlement.' " *Ante* at 174. The likelihood of settlement almost certainly increases with the amount of information that the parties have regarding the subject of settlement. How can the majority's interpretation conceivably encourage settlement when it compels defendants to proceed on the basis of incomplete information?

IV. WAITING PERIOD

The second major issue concerns how long a plaintiff must wait after giving notice before filing his complaint. The relevant statutory provisions state:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
>
> * * *
>
> (7) Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:
>
> (a) The factual basis for the defense to the claim.

> (b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.
>
> (c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.
>
> (d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.
>
> (8) If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period. [MCL 600.2912b.]

After receiving plaintiff's notice, Shabahang responded, but his response did not satisfy the requirements of § 2912b(7).[14] Plaintiff then commenced his action 175 days after giving notice. I agree with the majority that a plaintiff can make a tentative determination regarding the sufficiency of a defendant's response pursuant to § 2912b(7), and I also agree with the Court of Appeals that plaintiff did not need to challenge the sufficiency of Shabahang's response before filing his complaint pursuant to the shortened waiting period established by § 2912b(8).

A plaintiff can file his suit after 154 days if he "does not receive the written response required under subsection (7)" within 154 days after giving notice. MCL 600.2912b(8). Importantly, the response a plaintiff must receive is that "required under subsection (7)," which clearly states that the defendant "shall furnish" a

[14] Shabahang's response clearly did not satisfy the substantive requirements of § 2912b(7), because it was completely unresponsive to those requirements. See *ante* at 182-183.

response "that contains" specific statements. Thus, similar to the requirements for a plaintiff's notice, § 2912b(7) places the burden on the defendant to provide a written response that includes the requisite statements. See *Roberts II*, 470 Mich at 686; *Roberts I*, 466 Mich at 66. If the defendant does not provide those specific statements, then the response cannot be said to be the one required by § 2912b(7). Plaintiff, therefore, may file his complaint after 154 days, because he did not receive the proper response.

However, to require a plaintiff to wait for a judicial determination regarding the sufficiency of defendant's response would effectively nullify the requirements of § 2912b(7). That is, a defendant could give a response that failed to comply with § 2912b(7) and suffer no consequences, because the only possible statutory consequence, plaintiff's early filing, would be unavailable until the court determined that the defendant's response was defective, and by that time, the 28 days between the 154-day period and the 182-day period would almost certainly have elapsed. Accordingly, plaintiff here properly filed his complaint against Shabahang based on his own determination that he never received the response required by § 2912b(7).[15]

Rather than adopting this straightforward understanding of § 2912b(8), the majority feels the need to additionally read into the law an entirely concocted and gratuitous "good faith" standard in determining whether the defendant's response is sufficient. That is, rather than assessing the defendant's response, and comparing it to the requirements of the statute, a plaintiff must now consider whether defendant's re-

[15] A plaintiff makes such determination at his own peril. If a court later determines that the response was not defective, then the plaintiff's complaint is subject to dismissal because he did not wait the full 182 days.

sponse constituted a "good-faith attempt to comply with the content requirements of the statute . . . ." *Ante* at 182. In the place of a clear rule of law, the majority interposes an obscure and vague standard by which a plaintiff, who probably desires nothing more than to know what is statutorily required of each party, must now assess the mindset of the defendant. The majority, of course, supplies no guidance for how to satisfy its new standard, which poses a particular conundrum for plaintiffs, because, if a court determines that a response *was* made in "good faith," the majority holds that the trial court should allow defendant to amend his response. *Ante* at 182. This means that if the plaintiff relied on his *own* assessment that the response was defective, and filed before the 182-day period had expired, defendant's amendment could retrospectively make the complaint untimely. Doubtlessly, however, the majority will "correct" this problem in some later decision by a new word formula that is equally disregardful of the language of the statute. By contrast, I would simply hold that a plaintiff may avail himself of the 154-day filing option if the defendant's response does not comply with the requirements of § 2912b(7), without regard to whether the defendant has or has not made a "good faith" effort to comply with that provision.

V. CONCLUSION

In summary, my concerns with the majority opinion are: (1) it ignores the great bulk of the language of the notice-tolling provision in interpreting that provision; (2) it ignores the larger statutory scheme within which the notice-tolling provision is located; (3) it creates a new "rule" whereby legislative amendments must be interpreted to alter the meaning of the amended statute even if the statute's clear language suggests otherwise; (4) it creates a new standard for determining a notice's

sufficiency that bears no relationship to the actual requirements set forth by the Legislature in § 2912b(4), in the process also giving no consideration to the standard set forth in *Roberts II*; (5) it gratuitously questions the validity of *Roberts I* and *Boodt* even though they interpreted a different version of the notice-tolling provision that has no bearing on the instant case; (6) it has interpreted an amendment of one statute to completely alter the meaning of another statute; (7) it allows proposed legislation that was never enacted to trump the meaning of legislation that was actually enacted; and (8) it reads words into a statute that are not there by concocting a "good faith" requirement in § 2912b(7).

I dissent and would hold that tolling can only be effected pursuant to § 5856(c) by a plaintiff's notice of intent that complies with the requirements of § 2912b(4). Accordingly, dismissal should be with prejudice with regard to West Michigan Cardiovascular and Spectrum Health, because plaintiff's notice did not toll the statute of limitations for those claims and his complaint was filed after the limitations period had expired. Further, I would hold that a plaintiff may commence an action 154 days after giving notice if the defendant's response does not comply with the requirements of § 2912b(7), rather than introducing a new "good faith" requirement in assessing such response. Because Shabahang's response did not comply with the requirements of § 2912b(7), plaintiff properly commenced his action 175 days after giving notice.

CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

JACKSON v GREEN ESTATE

Docket No. 136423. Argued April 7, 2009 (Calendar No. 3). Decided July 30, 2009.

Joan B. Jackson brought an action in the Charlevoix Circuit Court against Ronald Green, alleging a breach of contract in the failure to repay loans made pursuant to oral agreements and seeking possession of two parcels of land: one they owned as joint tenants and another they owned as joint tenants with full rights of survivorship. The court, Richard M. Pajtas, J., granted Green summary disposition with respect to the land, concluding that the deeds conveying it were valid. The court denied Green summary disposition with regard to the loans, however, concluding that the statute of limitations did not bar Jackson's breach of contract claim. A jury subsequently found in Jackson's favor on the breach of contract claim. Jackson appealed the grant of summary disposition in Green's favor on the issue of the deeds, and Green cross-appealed the denial of his summary disposition motion on the breach of contract claim. Green also filed a separate action to partition the parcels, which was stayed pending the appeal. Green died while the appeal was pending, and his estate was substituted as the plaintiff in the partition action and as the defendant in this case. The Court of Appeals, MARKEY, P.J., and METER and MURRAY, JJ., affirmed in part, vacated in part, and remanded the case in an unpublished opinion per curiam, issued April 1, 2008 (Docket No. 269244). The Court held that because of Green's death and the lack of a partition order, Green's interest in the parcels of land had reverted to Jackson on his death. The Court also affirmed the trial court's denial of summary disposition on the breach of contract claim. The Supreme Court granted the estate leave to appeal. 482 Mich 981 (2008).

The Supreme Court affirmed the judgment of the Court of Appeals.

Justice CORRIGAN, joined by Justices YOUNG and MARKMAN, would hold that a joint tenant can sever an ordinary joint tenancy by compelling a partition. The filing of a partition action, however, does not by itself sever a joint tenancy. Until the court enters a partition order, a partition has not been compelled, and the joint

tenancy has not been severed. Green's interest in the parcel that he and Jackson held as ordinary joint tenants thus did not survive his death because no partition order had been entered. The judgment of the Court of Appeals on this issue should be affirmed.

Justice YOUNG, joined by Justice CORRIGAN, would hold that the period of limitations does not begin to run on a breach of contract claim related to oral loans that have no fixed time for repayment until either the lender demands payment, expressly or by filing a complaint, or a reasonable amount of time elapses without a demand. Because the oral loan agreements in this case did not set a time for repayment, they were payable on demand. Thus, Green could not have breached the oral loan agreements until Jackson demanded payment or until a reasonable amount of time had elapsed. What constitutes a reasonable amount of time to demand payment is a factual question for the jury to decide. Jackson did not demand payment until she filed this lawsuit, and the finder of fact properly decided the question. The judgment of the Court of Appeals on this issue should be affirmed.

Justice MARKMAN would hold that the statute of limitations bars Jackson's recovery on all but the last loan made because it was the only one to fall within the six-year limitations period for contract claims. Under *Palmer v Palmer*, 36 Mich 487 (1877), a note payable on demand is payable at once and without a demand, so the period of limitations runs from the date of the note's delivery. Because *Palmer* (a) establishes at least some modicum of certainty with respect to the period within which a lawsuit can be brought, one of the principal purposes of a statute of limitations, (b) has adequately served as the law of this state for well over a century, and (c) should apply equally to written and oral contracts, because the policies underlying statutes of limitations are implicated no less strongly in the latter than in the former circumstances, the judgment of the Court of Appeals on this issue should be reversed.

Justice CAVANAGH, joined by Chief Justice KELLY, would allow the merits of Green's partition action to be heard because it is an action that comes within the purview of the survival statute, MCL 600.2921, which provides that all actions survive a claimant's death. With regard to the statute of limitations issue, Justice CAVANAGH would apply the rule of *Smith v Smith Estate*, 91 Mich 7 (1892), which held that if a plaintiff failed to make a demand for repayment within a reasonable time, the court will presume that a demand was made at the expiration of a reasonable time and the period of limitations will begin to run at that time. As a matter of law, the reasonable time for making a demand is six years, which

is the time equivalent to the period of limitations for bringing an ordinary money claim, and the plaintiff then has six years under the statute of limitations to bring suit. Thus, a plaintiff who does not demand repayment has 12 years to bring a contract action on an oral loan that specified no time for repayment. All of Jackson's claims were timely made except those for the two loans given more than 12 years before she filed her complaint. The judgment of the Court of Appeals on both issues should be reversed.

Justice WEAVER, joined by Justice HATHAWAY, stated that leave to appeal was improvidently granted because the result the Court of Appeals reached was correct.

Laurie S. Longo and *Dickinson Wright PLLC* (by *John G. Cameron, Jr.*) for Joan B. Jackson.

Brown Powers, PLLC (by *Bridget Brown Powers* and *Jennifer J. Schafer*), for the estate of Ronald Green.

CORRIGAN, J. We granted leave to appeal to consider whether an action to partition real estate may go forward when the joint tenant who filed the action died before an order of partition entered.[1] We would hold that title vested in the surviving joint tenant on the decedent's death because the mere filing of a partition action does not sever a joint tenancy and no order granting partition was entered before the death. We would thus affirm the trial court's denial of defendant's motion for summary disposition and the judgment of the Court of Appeals on the partition issue.

I. FACTS AND PROCEEDINGS

At issue in this case are two parcels of real estate held by plaintiff and defendant as joint tenants and a series

[1] We also granted leave to appeal to consider whether the statute of limitations bars plaintiff's claim for breach of contract. That issue is addressed in separate opinions by Justices CAVANAGH, YOUNG, and MARKMAN.

of oral loans from plaintiff to defendant.[2] In May 1991, defendant negotiated the purchase of a parcel of land on behalf of plaintiff, and the deed conveyed the land to both parties as joint tenants. In September 1991, plaintiff purchased a second parcel of property, which was conveyed to plaintiff and defendant as joint tenants with full rights of survivorship.

In 2004, plaintiff filed a breach of contract action, alleging that defendant had failed to repay the loans. Plaintiff also sought to force defendant to relinquish his right to the two parcels of land. The trial court granted summary disposition for defendant regarding the deeds for the properties, holding that the deeds were properly executed and gave defendant valid property interests. Regarding the loans, the court did not accept defendant's argument that the statute of limitations barred plaintiff's claim. A jury found that each check plaintiff issued to defendant was a loan, and the court entered judgment on the verdict in plaintiff's favor.

Defendant then filed a separate action for partition of the parcels. At plaintiff's request, the partition action was stayed pending the appeal in this case. Defendant unexpectedly died while the appeal was pending in the Court of Appeals. His estate was substituted as the plaintiff in the partition action and as the defendant in this case.

The Court of Appeals affirmed the trial court's ruling that defendant possessed a valid property interest in the two parcels, but held that because no order severing the joint tenancy had issued in the partition action before defendant died, defendant's interests in the parcels reverted to plaintiff upon defendant's death.

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[2] The defendant's estate was substituted as a party when the original defendant died, but for ease of reference we will refer to both the original defendant and his estate as "defendant."

The Court of Appeals further held that the statute of limitations did not bar plaintiff's breach of contract action for repayment of the loans because the claim did not accrue until plaintiff demanded repayment by filing her complaint in 2004.[3]

We granted defendant's application for leave to appeal.[4]

II. STANDARD OF REVIEW

Whether a partition action may go forward if a joint tenant dies before the joint tenancy is severed is a question of law that we review de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

III. PARTITION

We agree with the Court of Appeals that defendant's interest in the parcel of land[5] automatically reverted to plaintiff when defendant died. Thus, defendant's estate has no interest in the property, and even if defendant's partition action survived his death under Michigan's survival statute, MCL 600.2921, nothing remains to partition.

"The principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate." *Albro v Allen*, 434 Mich 271, 274-275; 454

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[3] *Jackson v Green Estate*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2008 (Docket No. 269244).

[4] 482 Mich 981 (2008).

[5] Only the parcel conveyed in the May 1991 deed is currently at issue. Defendant does not dispute plaintiff's right of survivorship in the property conveyed in the September 1991 deed.

NW2d 85 (1990). An ordinary joint tenancy[6] may be severed, and the right of survivorship thereby destroyed, by an act of the parties, conveyance by either party, or levy and sale on an execution against one of the parties. *Id*. at 275.

A party can sever a joint tenancy by compelling a partition. *Smith v Smith*, 290 Mich 143, 155; 287 NW 411 (1939), quoting *Midgley v Walker*, 101 Mich 583, 584; 60 NW 296 (1894). Until an order of partition has been entered, however, a partition has not been compelled and, thus, the joint tenancy has not been severed. See Anno: *What acts by one or more of joint tenants will sever or terminate the tenancy*, 64 ALR2d 918, 956 (explaining that "[i]t is not the filing of the partition action which terminates the joint tenancy, but only the judgment in such action which has that effect") (quotation marks and citation omitted).

Indeed, the universal rule in the United States is that a pending suit for partition does not survive the death of one of the joint tenants. See *Heintz v Hudkins*, 824 SW2d 139, 142-143 (Mo App, 1992), and cases cited therein. "This rule is based on two related concepts: First, the theory of survivorship—that at the moment of death, ownership vests exclusively in the surviving joint tenant or tenants—and second, the doctrine that severance of the joint tenancy does not occur until the

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[6] In addition to an ordinary joint tenancy, Michigan recognizes a distinct category of joint tenancy known as a "joint tenancy with full rights of survivorship," which consists of a joint life estate with dual contingent remainders. *Albro*, *supra* at 275; see also 1 Cameron, Michigan Real Property Law (3d ed), § 9.11, p 322. "While the survivorship feature of the ordinary joint tenancy may be defeated by the act of a cotenant, the dual contingent remainders of the 'joint tenancy with full rights of survivorship' are indestructible." *Albro*, *supra* at 275-276. The parcel at issue here, the one conveyed in the May 1991 deed, was held under an ordinary joint tenancy.

partition suit reaches final judgment." *Id.*, citing *Cobb v Gilmer*, US App DC 398, 400; 365 F2d 931 (1966).

Accordingly, we would hold that the filing of the partition action did not sever the joint tenancy because an order effectuating a partition had not entered at the time of defendant's death. Therefore, regardless of whether defendant's partition action survived his death under the survival statute, his interest in the parcel of land did not.

IV. CONCLUSION

We would hold that defendant's filing of the partition action did not sever the joint tenancy because no order granting partition was entered before defendant's death. Thus, title vested in plaintiff when defendant died, and nothing remains to partition. The Court of Appeals correctly analyzed the partition issue, and we would therefore affirm its judgment on that issue.

YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

YOUNG, J. I agree with the analysis set forth in Justice CORRIGAN's opinion, which affirms the Court of Appeals on the partition issue. I would further hold that the statute of limitations does not bar plaintiff's claim for breach of contract on the series of oral agreements for loans. Because the loans were made with no fixed time of repayment, they were payable on demand. The period of limitations would not begin to run on such a claim until either a demand was made, expressly or by filing a complaint, or a reasonable amount of time had elapsed without a demand. In this case, no demand was made until the action was filed.

The issue of when a period of limitations begins to run on an oral agreement for a loan that has no fixed date of payment is a question of law that we review de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

The applicable limitations period for plaintiff's breach of contract claim is six years. MCL 600.5807(8). The central issue here is when the limitations period began to run. "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues." MCL 600.5827. Moreover, a claim generally accrues when the wrong is done. *Boyle v Gen Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003).

> The general rule governing the commencement of the running of the statute of limitations is that the statutory period is computed from the time when the right of action that the plaintiff seeks to enforce first accrued; ordinarily, *in an action based on a contract, accrual occurs as soon as there is a breach of contract*, with some courts qualifying this by stating that accrual occurs when the promisee discovers or should have discovered the breach, and others stating that accrual occurs upon breach, whether or not the promisee is then aware of the breach. [31 Williston, Contracts (4th ed), § 79:14, pp 303-307 (emphasis added).]

In determining when the period of limitations begins to run on a loan that has no repayment term, we must therefore necessarily determine when a breach of contract occurs.

The oral loan agreements in this case did not set a time for repayment. There is no controlling caselaw that establishes when a borrower is in breach of an oral loan agreement that is silent concerning when repayment must occur. Thus, this Court should articulate a rule of law to determine when a breach occurs under the circumstances in this case.

We do have some established bedrock principles to guide us in formulating such a rule. A loan made with no fixed time of repayment is payable on demand. *Colburn v First Baptist Church & Society of Monroe*, 60 Mich 198, 200; 26 NW 878 (1886). As a general matter, because no terms of repayment were specified in the contracts, the oral loan agreements could not have been breached until payment was demanded and the demand was rebuffed.

Nevertheless, the absence of a specific time for repayment does not allow a creditor to withhold this demand for an indefinite period of time. In the absence of an agreement to the contrary, we presume that the parties intended plaintiff's demand for repayment to occur within a reasonable amount of time. See *Duke v Miller*, 355 Mich 540, 542-543; 94 NW2d 819 (1959) ("[W]hen a contract is silent as to time of performance or payment, absent any expression of a contrary intent, the law will presume a reasonable time."); *Pierson v Davidson*, 252 Mich 319, 324; 233 NW 329 (1930) ("It is a general rule of law that where no time is stipulated, a reasonable time will be presumed. Reasonable time depends upon the facts and circumstances of each case.").[1] Determining what constitutes a reasonable amount of time to request repayment of a loan is necessarily a factual question properly decided by the jury.

Ultimately, a breach is the *sine qua non* of any contract dispute regarding repayment. Justices MARKMAN and CAVANAGH provide alternative theories of when a breach

[1] Although Justice CAVANAGH criticizes my citation of *Pierson*, this proposition is a well-established tenet of Michigan's contract law. Indeed, *Smith v Smith Estate*, 91 Mich 7; 51 NW 694 (1892), which Justice CAVANAGH applies to the instant case, established the very principle he criticizes in this opinion. *Smith* explained that a demand for payment "should, upon principle and the best authority, have been made within a reasonable time . . . ." *Id.* at 11.

occurs if the parties failed to supply a repayment term. Justice MARKMAN determines that a breach occurs *immediately on payment of the loan principal*. Justice CAVANAGH determines that a breach occurs *exactly six years after payment of the loan principal*. Neither theory comports with the practice of parties, especially in a case like this, which involved a series of loans made over a period of eight years.

Justice MARKMAN would extend the rule articulated in *Palmer v Palmer*, 36 Mich 487 (1877). In *Palmer*, this Court held that "a note payable on demand is payable at once and without demand, so that the statute runs from its delivery." *Id*. at 491. The central rationale of the *Palmer* rule was to prevent a creditor from keeping a debt alive by declining to make a demand until evidence grew stale, thereby defeating the statute of limitations. "If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it." *Id*. at 494.[2]

Palmer and its progeny thus recognized an implied demand for repayment of *written* demand notes. This Court has not applied the *Palmer* holding to oral loan agreements. I can discern no reason to extend what is essentially a legal fiction—that a breach occurs immediately upon the making of a loan even though no actual demand was made—to oral loan agreements.

I believe that the principle of law articulated in *Palmer*, which presumes a demand for repayment—and

[2] See also *Citizens' Savings Bank v Vaughan*, 115 Mich 156, 159; 73 NW 143 (1897) ("[T]he universal rule is that [a demand] note is due at once, and that no demand is necessary before bringing suit."); *Taylor v Rugenstein*, 245 Mich 152, 154; 222 NW 107 (1928) ("The general rule is that suit may be brought on a demand note immediately after delivery, and therefore the statute of limitations begins to run from the day of delivery.").

therefore a breach—immediately upon payment of the loan principal, is illogical and entirely inconsistent with contracting parties' intent. I suspect that no one making or receiving a loan believes that the recipient is *automatically* in breach of the loan as soon as the principal is paid. However, this is the "logic" of the *Palmer* rule. For this reason, I would not extend *Palmer* beyond its facts.

Justice CAVANAGH would extend the mechanical rule established in *Smith v Smith Estate*, 91 Mich 7; 51 NW 694 (1892), to bar recovery on any loan made more than 12 years before the plaintiff filed her complaint. *Smith* concluded that, when no express demand for payment has been made, "a demand should be presumed at the expiration of the time when an ordinary money claim would be barred by the statute [of limitations]," *id*. at 11, that is, six years. A breach would then automatically occur after six years, and the creditor would then have an additional six years to bring a cause of action for payment. In this respect, *Smith* suffers from the same wooden approach as *Palmer* in determining when a breach of a contract occurs if the parties have not supplied a term for repayment. Why, given all the variables in a contractual relationship, is six years ineluctably a "reasonable" time in which to make a demand? In this very case, the lender continued to make a series of new loans—a fact that would seem to undermine either the *Palmer* "breach on payment of the loan" or the *Smith* "six years equals a breach" theory.

Smith is distinguishable from the instant case because it involved not a monetary loan, but a sale of logs. "[W]e have no doubt that the transaction was a sale . . . ." *Id*. Although the *Smith* Court would have applied this rule to loans, see *id*. at 12, that discussion

was dictum. I would not extend this strict rule to the context of a loan, as the rule fails to take into account the particular circumstances of a given loan. Instead, I would leave the question whether a plaintiff waited an unreasonable amount of time before demanding repayment to the wisdom of a jury.

Plaintiff here did not demand repayment until filing this action. In the absence of a demand for repayment, defendant could not have breached the loan agreements until a reasonable time in which to have made a demand had elapsed.[3] Any breach of contract claim would need to have been filed within six years of that time because the limitations period would not have begun to run until that time. I agree with the Court of Appeals that "it was not error for the [circuit] court to determine that the nature of the disbursements, and consequently whether plaintiff's claims regarding the alleged loans were barred by the applicable statute of limitations, was a question of fact that was properly decided by a jury."

In conclusion, I would hold that the statute of limitations did not bar plaintiff's breach of contract claim because plaintiff did not make a demand for repayment until she filed this lawsuit and no breach of contract could have occurred unless and until a demand was made and refused or a reasonable amount of time had elapsed without a demand. I agree with the Court of Appeals that the finder of fact properly decided this case.

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[3] Under the rule established in *Brion v Kennedy*, 47 Mich 499; 11 NW 288 (1882), if no demand for repayment is made before the filing of the complaint, the filing of the complaint is considered to be the demand. The central inquiry in this type of case is whether the plaintiff's demand for repayment occurred within a reasonable period following the loan or whether that reasonable period elapsed—and therefore the period of limitations began to run—before the express demand for repayment.

CORRIGAN, J., concurred with YOUNG, J.

MARKMAN, J. I agree with Justice CORRIGAN's opinion, which would affirm the Court of Appeals on the partition issue. I agree that title vested in the surviving joint tenant on the decedent's death because the mere filing of a partition action does not sever a joint tenancy when no order granting partition was entered before the death. However, I would reverse the judgment of the Court of Appeals on the statute of limitations issue. I disagree that the statute of limitations does not bar recovery on any of the loans. Instead, I would hold that the statute of limitations bars recovery on all but the last loan made because it is the only one to fall within the six-year limitations period. MCL 600.5807(8).

Plaintiff filed this action, claiming that she gave defendant's decedent a series of checks as loans totaling more than $50,000, for which the parties did not have written contracts. Rather, defendant's decedent allegedly asked to borrow money at various times over a period of years. Defendant moved for summary disposition, arguing that the statute of limitations barred the claim, and the trial court denied the motion. A jury found that all the checks were loans, all but one of which had not been repaid. The Court of Appeals upheld the denial of summary disposition on the statute of limitations issue, *Jackson v Green Estate*, unpublished opinion per curiam, issued April 1, 2008 (Docket No. 269244),[1] and this Court granted leave to appeal, 482 Mich 981 (2008).

I would hold that the period of limitations expired for all but the last loan. The Court of Appeals correctly observed that if no time is set for the repayment of

[1] Decedent died while the appeal was pending. His estate was substituted as the defendant.

borrowed money, the loan is impliedly payable on demand. See *Colburn v First Baptist Church & Society of Monroe*, 60 Mich 198; 26 NW 878 (1886).[2] But when does the period of limitations begin to run on a loan that is payable on demand? Does it begin running when the loan is made, when payment is demanded, or at some other time? This Court answered that question in *Palmer v Palmer*, 36 Mich 487, 491 (1877):

> It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where from the form of the contract it is manifest that immediate payment was not expected.

Palmer proceeded to explain the rationale for this rule:

> For if the debt did not become payable until fixed by demand, and the demand was optional with the creditor, no tender could be made which would bind him, and he could keep the debt alive in spite of the debtor, for an indefinite period. If there was any infirmity in the consideration, or

[2] Justice YOUNG's "reasonable time" approach is inconsistent with *Colburn*, 60 Mich at 200, because *Colburn* held that a loan made with no fixed time for repayment is payable on demand. That is, such a loan is "impliedly payable on demand," *id.*, not after some "reasonable time." Moreover, his reliance on *Pierson v Davidson*, 252 Mich 319, 324; 233 NW 329 (1930), for the proposition that "where no time is stipulated, a reasonable time will be presumed," is misplaced because this language was clearly dictum, since *Pierson* immediately thereafter held, "However, it does not even become necessary for us to determine what was the reasonable time, for the parties themselves stipulated that the title should be cleared by February 1, 1929 . . . ." I believe his reliance on *Duke v Miller*, 355 Mich 540; 94 NW2d 819 (1959), is also misplaced because, unlike the instant case, *Duke* did not involve when a period of limitations begins to run; instead, it only addressed whether a memorandum that does not specify the time for payment is sufficient under the statute of frauds as evidence of an agreement to sell land. Incidentally, I am also perplexed by Justice CAVANAGH's position because, although he criticizes Justice YOUNG at length for adopting the "reasonable time" approach, *post* at 237-239, he then appears to adopt it himself, *post* at 244-245.

> any defect in the binding character of the obligation, he might retain it until all testimony was lost, and defeat the defense. This is the mischief which the statutes of limitation were intended to remedy . . . .
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> * * *
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> We cannot but think this to be sound doctrine; whatever may have been the ancient prejudice against statutes of limitation they are now regarded as just and entitled to be fairly construed. If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent.[3] But where no delay is contemplated the

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[3] In *Smith v Smith Estate*, 91 Mich 7, 9; 51 NW 694 (1892), the decision on which Justice CAVANAGH primarily relies to conclude that the period of limitations did not begin to run until six years after the loans were made, delay was contemplated by the express terms of the contract, i.e., "when Armstrong came to him to request a loan of the logs to Eugene, Abram said to him, in substance, that he might have them, as he had more than he needed at that time, but they must be returned to him when he demanded them"; "it was contemplated between the parties that logs of like kind and quality should be returned as soon as Eugene's logs . . . came down the stream and into the St. Clair river." By contrast, the express terms of the instant contracts no more contemplated delay than did the express terms of the contract in *Palmer*. Given that Justice CAVANAGH concedes that the only "express term" of the instant contracts is that "defendant asked to borrow money from plaintiff," *post* at 240, I am not quite sure why he disagrees with my conclusion that the express terms of the contracts did not contemplate delay any more than the *Palmer* contract. He appears to suggest that the fact that "there were no 'express terms' of the contracts that contemplated immediate payment,"

post at 244, is the equivalent of meaning that the express terms contemplated delay. However, the express terms in these contracts simply did not *address* whether delay was or was not contemplated, because, as Justice CAVANAGH earlier explained, the only express term of the contracts was that defendant "borrow[ed]" money from plaintiff. *Post* at 240. In addition, it is noteworthy that, although Justice CAVANAGH criticizes Justice YOUNG for relegating to a jury the determination whether claims are barred by the statute of limitations, *post* at 237-239, he nevertheless relies on the jury's alleged conclusion that the parties did "contemplate delay in repayment," *post* at 240 n 11, to conclude that the period of limitations did not begin to run immediately. Would Justice CAVANAGH leave the statute of limitations issue up to the jury or not? Contrary to Justice CAVANAGH's contention, *post* at 240 n 11, the mere fact that the jury concluded that "repayment is now owed" does not necessarily mean that the jury either concluded that repayment was not owed as soon as the money was borrowed or that the parties did "contemplate delay in repayment." Further, *Smith* limited its holding to cases in which "a demand is necessary," 91 Mich at 12, and, as discussed earlier, a demand was not necessary in this case, *Palmer*, 36 Mich at 491 (stating that "a note payable on demand is payable at once and *without demand*") (emphasis added). For these reasons, I believe that *Palmer*, rather than *Smith*, is controlling in this case.

Moreover, extending *Smith* to the instant circumstances would anomalously provide those parties who *never* make a timely demand with a longer period in which to bring an action than those parties who *do* make a timely demand. Justice CAVANAGH claims that we "simply disagree on when accrual should occur." *Post* at 242. Although this is correct, the accrual date makes all the difference. Under Justice CAVANAGH's position, if a demand is made immediately after the loan is made, the claim will accrue immediately and the period of limitations will expire in 6 years from the date of the loan; however, if no demand is ever made, the claim will not accrue until 6 years have passed, and the period of limitations will not expire until 12 years after the loan was made. How can this be characterized as anything but an anomalous result? Justice CAVANAGH asserts that he is "perplexed" about why I believe this to be an anomalous result. *Post* at 242 n 13. I believe this to be so because, under Justice CAVANAGH's approach, the plaintiff has complete control over when his action accrues, and thus when the period of limitations begins to run. What concerns me is not the fact alone that the plaintiff would get more time; rather, it is that the plaintiff would get to choose exactly how much time he would have to bring an action. If the plaintiff wanted to file his action immediately, he could do so; if, on the other hand, he wanted to wait 10 or 11 or 12 years, he could do that as well. Contrary to Justice

> rule is just and reasonable; and the presentment should be reasonably prompt, or the creditor should be subjected to the operation of the statute. [*Id*. at 491, 494.]

Palmer was followed in later cases. See, e.g., *Beardsley v Webber*, 104 Mich 88, 89; 62 NW 173 (1895) ("No demand is necessary on a demand note . . . ."); *Citizens' Savings Bank v Vaughan*, 115 Mich 156, 159; 73 NW 143 (1897) ("[T]he universal rule is that [a demand] note is due at once, and that no demand is necessary before bringing suit."); *Peninsular Savings Bank v Hosie*, 112 Mich 351, 355; 70 NW 890 (1897) (" 'If the instrument be payable on demand, the statute begins to run immediately.' ") (citation omitted); *Taylor v Rugenstein*, 245 Mich 152, 154; 222 NW 107 (1928) ("The general rule is that suit may be brought on a demand note immediately after delivery, and therefore the statute of limitations begins to run from the day of delivery.").

In light of these authorities, the Court of Appeals erred, in my judgment, when it stated that "the statute of limitations would not begin to run on such a claim until a demand for repayment was made . . . ." *Jackson*, unpub op at 5.[4] *Palmer* and its progeny established that the period of limitations begins to run

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CAVANAGH's contention, *post* at 242 n 13, *Colburn* provides the plaintiff with such unfettered authority only if one ignores *Palmer*, which held that because no demand is necessary, the period of limitations begins to run immediately. Thus, my "consternation" is not caused by *Colburn*, but by Justice CAVANAGH's disregard of *Palmer*. *Post* at 242 n 13. Finally, contrary to Justice CAVANAGH's contention, my "insistence . . . that accrual must occur at the loan's inception" is not "contrary to the general rule," *post* at 242; rather, it is, in fact, in accord with the general rule both in Michigan, see *Palmer*, and in a vast majority of other jurisdictions, see n 5 of this opinion.

[4] Likewise, Justice YOUNG errs by reaching the same conclusion because *Palmer* specifically rejected this. In *Palmer*, this Court explained:

from the day that a demand note is delivered, unless a contrary intention is apparent. While those cases addressed written demand notes, there is no apparent reason why *Palmer* should not equally apply to an oral contract.[5] In fact, the policies underlying statutes of limitations are implicated even more strongly in the

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> The [lower] court found that the suit was not barred. This conclusion was based on the theory that until demand [was] made no action accrued; and that as the time limited by the statute runs from the time when action accrues, it did not begin to run until thirty days after [the demand was made]." [*Palmer*, 36 Mich at 490.]

Palmer, however, rejected this analysis, reversed the lower court's judgment, and held that the period of limitations began running immediately upon delivery. In addition, Justice YOUNG's conclusion that there is no breach, and thus that the action does not accrue until a demand has been made, is inconsistent with the undisputed fact that, once money is borrowed, an action seeking repayment can be brought at any time. Because an action cannot be brought until it has accrued, it necessarily follows that once money is borrowed, the action accrues immediately and, thus, the period of limitations begins to run immediately. For this reason, I disagree with Justice YOUNG that the *Palmer* rule is "illogical" and "inconsistent with contracting parties' intent." *Ante* at 218-219.

[5] Indeed, the majority of other jurisdictions have held that the period of limitations begins to run from the date the borrowed money is given to the borrower under an unwritten or verbal agreement to repay. See Anno: *When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment*, 14 ALR4th 1385, 1388 ("Reasoning that oral loans without any due date or provision for repayment occupy the same legal status as obligations due on demand, the court said that the statute of limitations period begins to run against suits based on demand obligations, and consequently against suits based on loans without repayment provisions, from the time the obligations or loan agreements are entered into by the parties."), citing *Gentry v Gentry*, 59 NM 395; 285 P2d 503 (1955). Justice CAVANAGH would reach another anomalous result in which, although the period of limitations would start running under *Palmer* immediately with regard to *written* contracts, the period of limitations would not start running with regard to *oral* contracts until either a demand was made or six years had elapsed. That is, according to Justice CAVANAGH, the period of limitations should be longer for oral contracts

latter circumstances because it is more difficult to produce evidence to defend against a stale claim of an oral agreement.[6]

Thus, I would reverse the Court of Appeals on this issue and hold that all the alleged loans other than the last one fall outside the period of limitations. That is, because plaintiff waited more than six years to demand payment on all the loans but one, all her claims but one are barred by the statute of limitations.

CAVANAGH, J. I disagree with the separate opinions of Justices CORRIGAN, YOUNG, and MARKMAN. On the partition issue, I would allow the merits of defendant's partition action to be heard because it comes within the purview of the survival statute. See MCL 600.2921. Regarding the statute of limitations issue, I find *Smith v Smith Estate*, 91 Mich 7; 51 NW 694 (1892), to be controlling, and I would apply its rule here to hold that

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than for written contracts, despite the fact that it is often considerably more difficult to establish the terms of an oral contract, as demonstrated by this very case.

[6] Unlike Justice YOUNG, I would not leave it to a jury to determine when a "reasonable" time to make a demand has elapsed. I cannot think of a procedure more likely to undermine one of the principal purposes of a statute of limitations, namely, to establish at least some modicum of certainty with respect to the period within which a lawsuit can be brought in response to allegedly wrongful conduct. Not only is Justice YOUNG's rule inconsistent with *Palmer*, 36 Mich at 491, and *Colburn*, 60 Mich at 200, as discussed earlier, I do not believe that he has demonstrated why stare decisis should not be followed with regard to these decisions, which have adequately served this state for well over a century. See *Robinson v Detroit*, 462 Mich 439, 466; 613 NW2d 307 (2000) (observing that before reversing a precedent, "the Court must ask [*inter alia*] whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce . . . practical real-world dislocations"). In particular, with regard to this Court's development of the common law, at least some compelling argument must be offered in support of altering the law, and I have heard no such argument raised here by either party.

all the claims were timely made except those that related to the first two loans. Accordingly, I would reverse the judgment of the Court of Appeals on both issues.

I. PARTITION

In Michigan, there are two forms of joint tenancies. *Albro v Allen*, 434 Mich 271, 274; 454 NW2d 85 (1990). The first is the standard form in which, upon the death of a joint tenant, the entire estate transfers to the surviving joint tenant or tenants. *Id.* at 274-275. In the standard joint tenancy, one joint tenant can unilaterally destroy the right of survivorship by severing the joint tenancy. *Id.* One way to sever the joint tenancy is a partition action. *Smith v Smith*, 290 Mich 143, 155; 287 NW 411 (1939), quoting *Midgley v Walker*, 101 Mich 583, 584; 60 NW 296 (1894).

The second form of joint tenancy is one that has "express words of survivorship in the granting instrument in addition to those creating a joint tenancy, such as . . . 'with full rights of survivorship.' " *Albro*, 434 Mich at 275 (citation omitted). In contrast to the standard joint tenancy, it is well settled in Michigan that the survivorship quality of this type of joint tenancy cannot be unilaterally severed by the act of one cotenant. *Id.* at 275-276. Thus, the survivorship right of this type of joint tenancy is indestructible and is not affected by a partition action.

The deeds in this case created both forms of joint tenancies. The September 1991 deed created the second, indestructible variety; thus, the defendant's partition action had no effect on the joint tenancy's survivorship quality, and the land automatically transferred to plaintiff upon defendant's death. The May 1991 deed, however, created a standard joint tenancy, which there-

fore could be affected by a partition action. Thus, the issue in this case is what effect defendant's death had on his pending partition action regarding the property covered by the May 1991 deed.

This Court's pronouncements regarding the absolute right of a cotenant to partition, coupled with the plain language of Michigan's survival statute, MCL 600.2921, demand that defendant's death not abate his partition action. Partition actions are governed by two sections of the Revised Judicature Act: MCL 600.3304 and MCL 600.3308. MCL 600.3304 states that "[a]ll persons holding lands as joint tenants . . . may have those lands partitioned." In addition, MCL 600.3308 states that "[a]ny person who has an estate in possession in the lands of which partition is sought may maintain a claim for partition of those lands . . . ." This Court has made strong statements about facially valid partition actions and the right of a joint tenant to compel partition in a standard joint tenancy: "The right of a cotenant to partition is *absolute*, not a mere matter of grace, within the discretion of the court, regardless of the motives of the parties entitled to partition." *Henkel v Henkel*, 282 Mich 473, 482; 276 NW 522 (1937) (quotation marks and citations omitted; emphasis added). Moreover, partition is mandatory "unless there is some paramount or controlling equity which warrants the court in refusing to act . . . ." *Id.*

When interpreting a statute, the primary goal is to give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). When the language of the "statute is clear and unambiguous, judicial construction is precluded." *Id.* (quotation marks and citation omitted).

Michigan's survival statute provides:

> *All actions and claims survive death*. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death. [MCL 600.2921 (emphasis added).]

The plain language of the statute is clear and unambiguous and therefore in need of no interpretation—*all* actions survive a claimant's death.

Not only is this interpretation consistent with the plain language of the statute, it is also consistent with the legislative history of the statute. This Court examined the lengthy history of the survival statute in *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987). " 'Early in its history, Michigan adopted a rather liberal "survival act" to preserve causes of action which, under common law, were terminated by the death either of the person injured or the tortfeasor.' " *Id.* at 436, quoting *Hawkins v Regional Med Laboratories, PC*, 415 Mich 420, 428-429; 329 NW2d 729 (1982). The statute was later amended to "expand[] the number of causes of action which survived a claimant's death," but "in [the Revised Judicature Act], the Legislature abandoned its restrictive 'laundry list' approach to the survival act" and amended it to its present form. *Hardy*, 429 Mich at 437. This Court then emphasized that the bill analysis accompanying the act clearly showed the Legislature's intent. *Id.* The relevant portions quoted were as follows:

> "*This section drastically changes the present law* . . . . At common law, personal rights of action died with the person. This seemed manifestly unfair in certain cases, so Survival Acts were written to allow certain actions to survive. *There is no good reason for allowing some actions to survive, and not others, apart from cultural inertia*. . . .
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> * * *

> "This section is a logical advance in the legislation in this area. That it has not been made earlier may be due to the unfortunate approach of the statutes in listing those actions which do survive, and thus overlooking those which the statute failed to cover. This section has the added advantage of simplicity in application." [*Id.* at 437-438.]

While the survival statute is commonly applied to tort actions, the history of and comments on the statute clearly illustrate the Legislature's intent to make *all* claims immune from attacks based on a claimant's death. The statute clearly abrogates the harsh common-law rule that pending actions die with the death of a party.[1] In fact, after reviewing the history of and comments on the statute in *Hardy*, this Court described the language of the statute as "sweeping and unambiguous" and declared that the statute is "universally applicable to *all* actions and claims which arise under the Revised Judicature Act." *Id.* at 438. A partition action is one of the actions included in the Revised Judicature Act. Given the survival statute's unqualified language and this Court's prior examination of the statute, I would hold that because defendant was alive when he filed his action for partition, the action survives and should be heard on its merits. To hold otherwise would frustrate the clear intent of the Legislature and would be inconsistent with this Court's prior declarations regarding the applicability of the survival statute to actions arising under the Revised Judicature Act.[2]

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[1] In Michigan, the common law governs unless it has been abrogated by statute. *Albro*, 434 Mich at 286 n 6, citing *Myers v Genesee Co Auditor*, 375 Mich 1; 133 NW2d 190 (1965), and *Bugbee v Fowle*, 277 Mich 485, 492; 269 NW 570 (1936).

[2] Justice CORRIGAN's opinion cites a section from the American Law Reports Annotated 2d to support its position that a judgment granting partition must be entered before a joint tenant's death in order to sever

Moreover, partition actions are equitable in nature. MCL 600.3301. Thus, this Court has broader authority to inject fairness and render a fair judgment. *Brown v Fletcher's Estate*, 146 Mich 401, 417-420; 109 NW 686 (1906) (acknowledging a softening of the common-law rule of abatement for a deceased party's claim when the claim is based in equity). In this case, notions of equity strongly support allowing the merits of defendant's partition action to be heard. After defendant filed an action for partition, his case sat idle for more than a year while plaintiff appealed the trial court's earlier ruling regarding the validity of the deeds. Eventually, the Court of Appeals summarily and correctly affirmed the validity of the deeds. Nonetheless, the Court of Appeals, without citing any supporting authority, held that because defendant had died before an order of partition was entered, his claim was moot. Given the validity of the May 1991 deed and defendant's absolute right to partition, I would allow defendant's action to continue. But for plaintiff's lengthy, unmeritorious, and collateral appeal and defendant's untimely death, the merits of defendant's claim would certainly have been heard. To hold otherwise would not only ignore notions of equity and this Court's pronouncements that the right to partition is absolute, but would also frustrate our Legislature's intent to make claims that arise under the Revised Judicature Act immune from attacks based on a claimant's subsequent death. See *Hardy*, 429 Mich at 436-438.[3]

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the joint tenancy. *Ante* at 214. The quotation used by her opinion, however, cites California law and therefore ignores the effect that *Michigan's* survival statute has on actions that arise under the Revised Judicature Act, such as the partition action here.

[3] Justice CORRIGAN's opinion ignores both the language of and this Court's pronouncements regarding Michigan's survival statute. It merely points to a "universal rule" that was pronounced by a Missouri court to

II. STATUTE OF LIMITATIONS

"[T]he period of limitations runs from the time the claim accrues," which occurs "at the time the wrong upon which the claim is based was done . . . ." MCL 600.5827.[4] In contract claims, the time of the wrong is the moment that the contract is breached. *AFSCME v Highland Park Bd of Ed*, 457 Mich 74, 90; 577 NW2d 79 (1998) (opinion by CAVANAGH, J.). This case involves oral loans with no terms expressing a time for repayment. Repayment of this type of loan is due upon a demand. *Colburn v First Baptist Church & Society of Monroe*, 60 Mich 198, 200; 26 NW 878 (1886). Hence, a claim for nonpayment of such a loan accrues when a demand for repayment is made. However, this Court has held that accrual cannot be left to the whim of the lender because, if it were, the lender could wait in near perpetuity until demanding payment, which would contravene the venerable aims of statutes of limitations. Indeed, in *Smith Estate*, 91 Mich at 11, this Court held that if a demand is necessary for accrual of the claim, it should be made within a reasonable time, and if the demand is not made within a reasonable time, then accrual occurs and the period of limitations begins to run at the end of the period that would have been a reasonable time in which to make the demand.

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explain why defendant's interest in the land did not survive his death. *Ante* at 214. I query why her opinion cites a Missouri case for its "universal rule," yet fails to cite a single case from this Court. Certainly, the Missouri court was not considering the effect of Michigan's survival statute when analyzing the partition claim before it. It belies logic and the intent of our Legislature to interpret the survival statute as allowing a deceased claimant's claim to survive under Michigan's survival statute, yet terminate the action on the basis of the claimant's death.

[4] The period of limitations for a contract claim is six years from the accrual date. MCL 600.5807(8).

In *Smith Estate*, the plaintiff sued to enforce a claim for the value of logs that were loaned to the defendant after the defendant failed to either return the logs or pay the plaintiff their value. *Id*. at 8-11. The Court, after reviewing testimony regarding the terms of the oral contract, held that the transaction was a sale and the claim was barred by the statute of limitations because the plaintiff failed to bring suit within six years after a reasonable time to demand payment had passed. *Id*. at 11-12.[5] The Court held that if a plaintiff failed to make a demand for repayment within a reasonable time, we should presume that a demand was made at the expiration of the reasonable time to begin the running of the period of limitations. The Court defined a reasonable time as equivalent to the six-year period of limitations for an ordinary money claim, thus giving a party six years to make a demand and six years to bring suit after having made the demand. *Id*. The Court adopted this rule from *Keithler v Foster*, 22 Ohio St 27 (1871). *Smith Estate*, 91 Mich at 12.[6] Moreover, the Court reasoned that its rule was driven by the purpose of the statute of limitations: "The object of the statute of limitations is a beneficial one; and it is a salutary protection against fraudulent and stale claims, which without it might purposely be postponed for enforcement until the lapse of time had destroyed the proofs of their falsity." *Id*. at 11.

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[5] The facts of the contractual relationship in *Smith Estate* are very similar to those in the instant contractual relationship. In both cases, the parties orally agreed that one party would loan personal property to the other party. In both cases, the party loaning the property kept a ledger or list of the separate loans made throughout a period of years. In both cases, neither party expressly contemplated when the loans would be due for repayment.

[6] See *Keithler*, 22 Ohio St at 32 (stating that "where no demand is shown to have been made within the statutory period for bringing the action, . . . for the purpose of setting the statute in operation, a demand will be presumed at the expiration of that period, from which time the statute will begin to run").

In essence, *Smith Estate* gives a plaintiff 12 years to bring a contract action on an oral loan that specified no time for repayment. The plaintiff has a reasonable time in which to make a demand, which *Smith Estate* held is six years as a matter of law. If no demand is made within six years, then the court will "presume" that a demand was made for the purposes of the statute of limitations.[7] Then, under the statute of limitations, the plaintiff has six years from the date of this presumed demand to bring a claim.[8]

In this case, consistently with the rule of *Smith Estate*, I would hold that the July 1991 and September 1992 oral loans between plaintiff and defendant are barred by the statute of limitations. Because plaintiff failed to make a demand for repayment within a reasonable time, I would presume that a demand was made at the expiration of the reasonable time and thus measure the period of limitations from the date of the presumed demand. There were 11 oral loans, which were made between July 1991 and February 1999. Plaintiff made no demand for payment until she filed her complaint covering all these loans in November 2004. Thus, for any loan made more than 12 years

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[7] Intuitively, if an actual demand occurred before the presumed demand, accrual would occur at the time of the actual demand.

[8] *Smith Estate* held that

> [t]his rule gives the party six years in which to make his demand, and six years in which to commence his suit after demand, in all cases where a demand is necessary before suit. See *Keithler v. Foster*, 22 Ohio St. 27 [1871]; *Massie v. Byrd*, 87 Ala. 672 (6 South. Rep. 145) [1889]; *Thrall v. Mead's Estate*, 40 Vt. 540 [1868]; *Codman v. Rogers*, 10 Pick. 119 [27 Mass 112 (1830)]; *Mitchell v. McLemore*, 9 Tex. 151 [1852]; *Eborn v. Zimpelman*, 47 [Tex] 503 [1877]; *Morrison's Adm'r v. Mullin*, 34 [Pa] 12 [1859]; *Ball v.* [*Keokuk & N W R*] *Co.*, 62 Iowa, 751 (16 N. W. Rep. 592) [1883]; *Lower v. Miller*, 66 [Iowa] 408 (23 N. W. Rep. 897) [1885]; Ang. Lim. § 96; Bus.Lim. § 159. [*Smith Estate*, 91 Mich at 11-12.]

earlier, i.e., before November 1992, plaintiff's claim would be untimely.[9] Plaintiff's claims included two such loans, which originated in July 1991 and September 1992. Thus, her claims on those loans were barred by the statute of limitations in July 2003 and September 2004. In contrast, the claims relating to the remaining nine loans, which were made between March 1994 and February 1999, were timely under the November 2004 complaint.[10]

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[9] This is because the latest reasonable time for plaintiff to make a demand on an oral loan made in November 1992 would be six years later—November 1998. And each of the claims on the pre-November 1992 loans would be time-barred because plaintiff filed her complaint covering all the loans in November 2004.

[10] Justice YOUNG contends that *Smith Estate* is distinguishable and, as a result, I am incorrectly extending that case by applying it here. *Smith Estate* dealt with the claim that the trial court wrongly precluded a certain witness's testimony. *Smith Estate*, 91 Mich at 8-9. That testimony would have been used to support the plaintiff's claim that the contract was a loan, rather than a sale. *Id*. at 9. It is true that *Smith Estate* concluded that the contract at issue was one for a sale, rather than a loan. But the Court went on to clearly explain that, if the testimony had been wrongly rejected, and if the contract was a loan, the error would have been harmless because the plaintiff's claim would have been untimely under the presumed-demand rule. *Id*. at 11-13. In fact, the unanimous *Smith Estate* Court expressly adopted the rule from the Ohio decision *Keithler v Foster* for the exact issue that is presented in the instant case. *Id*. at 12. The *Keithler* court clearly noted that

> the statute [of limitations] begins to run, in cases like this, from the time of demand, [and] it would be but reasonable to hold, in the absence of other special circumstances, where no demand is shown to have been made within the statutory period for bringing the action, that, for the purpose of setting the statute in operation, a demand will be presumed at the expiration of that period, from which time the statute will begin to run. [*Keithler*, 22 Ohio St at 31-32.]

Thus, *Smith Estate* held that if the testimony had been admitted, and the contract had been seen as an oral loan with no specified time for repayment, this rule would apply. Thus, I find *Smith Estate* to be directly on point and persuasive. Further, to the extent that this portion of *Smith*

As noted, I agree with Justice YOUNG's statement that "the absence of a specific time for repayment does not allow a creditor to withhold this demand for an indefinite period of time." *Ante* at 217. However, I do not agree with the construct that Justice YOUNG develops to address this concern. He institutes a rule that allows the jury to decide when a presumed demand should occur, which is set at what the jury determines to be a reasonable time. Justice YOUNG bases this construct on the idea "that the parties intended plaintiff's demand for repayment to occur within a reasonable amount of time." *Ante* at 217. I decline to accept this construct for several reasons.

First, there is little precedential support for this construct. Justice YOUNG relies on *Pierson v Davidson*, 252 Mich 319; 233 NW 329 (1930), to support his construct. But *Pierson* is both factually and legally distinguishable from the present case. Factually, *Pierson* involved a written oil and gas lease agreement. *Id*. at 320-321. Thus, unlike the present case, *Pierson* did not deal with an oral loan. And legally, *Pierson* dealt with the contractual requirement that the lessor clear a cloud on the title to the real property or the lease would " 'be voided and extinguished, and shall become null and void . . . .' " *Id*. at 321. *Pierson* did not deal with the question of when payment on an oral promise to repay, which hinges on a demand, was due. In contrast, *Smith Estate* dealt with this Court's unanimous statement that, in the case of an oral loan with no time set for repayment, a demand is to be presumed six years from the loan's inception and accrual occurs at that time. In light of Justice YOUNG's refusal to rely on *Smith Estate*

Estate was dictum, I would adopt it as the controlling rule on this issue, which is exactly what our colleagues in *Smith Estate* unanimously said that they would do.

(a case that is factually and legally exactly on point), I question his reliance on *Pierson* because that case seems much less applicable here than *Smith Estate*. It is unclear why Justice YOUNG finds *Smith Estate* too dissimilar for application here, while concomitantly finding the much more distinguishable *Pierson* case to be controlling.

Second, I believe that Justice YOUNG's construct overly diminishes the statute of limitations. Justice YOUNG puts no restriction on how long a reasonable amount of time may extend. Instead, he would allow a reasonable amount of time to go on indefinitely. I think that this eviscerates the statute of limitations and undermines its purposes in this context, as *Smith Estate* clearly discussed. See *Smith Estate*, 91 Mich at 11-12. In contrast to Justice YOUNG's construct, the *Smith Estate* construct presents a better balance between the rationales supporting the statute of limitations and the legal precepts pertaining to oral contracts. The *Smith Estate* construct gives definite answers. Under no circumstances may a plaintiff carry out his claim more than 12 years past the time of the oral loan that has no time set for repayment. As noted, this Court lauded the stability and predictability of this construct in *Smith Estate* because it reduces fraud and the litigation of stale issues. See *id*. at 11. Justice YOUNG's construct does not protect against these problems. The *Smith Estate* construct also honors the concepts that an oral loan is not due until a demand is made and a claim does not accrue until a demand (presumed or actual) occurs. In contrast, under Justice YOUNG's construct, a plaintiff need only convince a jury that it was reasonable to delay the demand for payment for any number of years in order to bring claims on loans that originated, conceivably, decades in the past.

Both Justice YOUNG's construct and the *Smith Estate* construct presume a demand at some point after the oral loan was made. I find the *Smith Estate* construct's method of determining when that presumption occurs to be more closely tied to the purposes of the limitations period, while honoring basic contract tenets. Further, *Smith Estate* provides the most applicable standard for the facts and issues in the present case; therefore, I would apply it in place of Justice YOUNG's construct. Under the *Smith Estate* construct, I would hold that only the claims on the first two loans (those arising before 1992) were time-barred.

I note that Justice MARKMAN questions my reliance on *Smith Estate*. He argues that the contract in *Smith Estate* contemplated a delay in repayment, whereas the "express terms of the instant contracts" did not contemplate any such delay. *Ante* at 223 n 3. I respectfully disagree. I question whether Justice MARKMAN can opine on the "express terms" of the instant contract with any specificity, given that the parties litigated the very existence of any oral contract. Indeed, the trial court discussed this case's facts as follows when reviewing a motion for summary disposition:

> The loans—or the distribution of money . . . is a close question, but there is some testimony that [Green] made a request to borrow, which I think impliedly includes a promise to repay, and while [Jackson] said [in her deposition] there was no specific agreement or promise to repay . . . , which certainly hurts her case, she did say that there was a request to borrow and, therefore, that's what caused the advance of monies.
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> So I think that there is a factual question as to whether these advances were gifts, whether they were, in fact, loans, as [Jackson] now claims, or whether they were, in fact, compensation as [Green] claims at least part of the advances were for.

Thus, while the jury eventually decided that there were enforceable oral contracts, I do not believe that the facts of this case support Justice MARKMAN's assertion that the contracts' express terms did not contemplate a delay in repayment.[11] The record only supports the fact that defendant asked to borrow money from plaintiff and that plaintiff responded by writing numerous checks. Moreover, the parties' actions actually indicated that they did contemplate a delay in repayment because plaintiff continually made numerous loans to defendant over a term of years. It strains reason to conclude, as Justice MARKMAN does, that the parties expected payment immediately yet, despite never receiving any such immediate payment, plaintiff continued to make additional loans over several years.[12]

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[11] In fact, the jury's own words belie Justice MARKMAN's contention that the parties did not contemplate delay in repayment. The jury stated that the oral loans were due at the time plaintiff's claim was filed, which was years after the loans were consummated. The jury answered a special interrogatory form regarding each loan as follows: "[Plaintiff] established . . . that there was an enforceable contract between [plaintiff] and [defendant], that this check was a loan expected to be repaid and [that] repayment is now owed to [plaintiff]." The jury did not conclude that payment was owed upon delivery. Justice MARKMAN disagrees because he thinks that "the mere fact that the jury concluded that 'repayment is now owed' does not necessarily mean that the jury either concluded that repayment was not owed as soon as the money was borrowed or that the parties did 'contemplate delay in repayment.' " *Ante* at 224 n 3. I disagree. The jury was tasked to decide whether the claims were timely. The jury decided that all of plaintiff's claims were timely and that payment was "now" due. "Now" could only mean at the time the jury made its decision because, if "now" also applied to when the loans were created, many of the claims would have been untimely because they came into existence more than six years before the claims were filed. Thus, the jury's conclusions do not support Justice MARKMAN's supposition that the parties did not contemplate delay in payment.

[12] I do not point to these possible interpretations of the instant agreements' terms to definitively say what the parties intended regarding delay in payment. Justice MARKMAN mistakes my point if that is what

Justice MARKMAN also argues that *Smith Estate* limited its holding to cases in which a demand is necessary. Assuming that he is correct, I do not see how this precludes the application of *Smith Estate* in this case. As Justice MARKMAN notes, if "no time is set for the repayment of borrowed money, the loan is impliedly payable on demand." *Ante* at 221-222, citing *Colburn*. It is uncontested that this case involves loans that set no time for repayment of the borrowed money. Hence, I think *Smith Estate* applies.

Justice MARKMAN also suggests that applying *Smith Estate* here "anomalously provide[s] those parties who *never* make a timely demand with a longer period in which to bring an action than those parties who *do* make a timely demand." *Ante* at 224 n 3. I disagree that following *Smith Estate*'s general rule that a demand is necessary to trigger accrual causes anomalous results. Under *Smith Estate*, the period in which to bring a

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he sees as motivating my reference to them. Instead, I simply note that these facts undercut Justice MARKMAN's assertion that "the express terms of the instant contracts no more contemplated delay than did the express terms of the contract in *Palmer* [*v Palmer*, 36 Mich 487 (1877)]." *Ante* at 223 n 3. This is important because Justice MARKMAN's position depends on equating *Palmer*'s demand note with the instant oral contracts. Thus, I merely note that Justice MARKMAN's linking of the two disparate types of agreements is not supported by their facts. Justice MARKMAN also asks whether I would leave the statute of limitations issue to the jury. *Ante* at 224 n 3. He seems to think that my references to this case's facts and the jury's conclusion undercut my adoption of the *Smith Estate* construct. I think that this opinion plainly notes that I conclude that, under *Smith Estate*, the statute of limitations issue for an oral loan having no specified time for repayment is a question of law for the court. That conclusion is not undermined by my pointing out that Justice MARKMAN's position of applying *Palmer* by analogy, which relies on the facts, is not supported by the facts of this case. Moreover, the "express terms" debate that Justice MARKMAN and I are engaged in shows how foolhardy undertaking such an endeavor is for this type of oral loan. Yet that endeavor is required for Justice MARKMAN to link *Palmer* to this case, whereas my approach requires no such legal groping.

claim is always six years—*after* accrual of the claim. Justice MARKMAN and I simply disagree on when accrual should occur. His insistence (contrary to the general rule) that accrual must occur at the loan's inception is what causes his perception of anomalous results. Under *Smith Estate*, every claimant has six years to bring his claim after it accrues, which is triggered by a demand or the presumed demand, whichever happens first. While I accept that Justice MARKMAN disagrees with this legal construct, I disagree with his assertion that it causes anomalous results, especially in light of his counterintuitive position that parties make oral loans to each other and expect payment immediately.[13]

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[13] Justice MARKMAN accepts that oral loans are impliedly due on demand and that accrual occurs on that demand. Noting his acceptance of this, I am perplexed about why Justice MARKMAN finds it anomalous that some oral loans accrue later than other oral loans. His example shows that he thinks it is inappropriate that a lender who makes an immediate demand has less time to bring a claim than a lender who never makes a demand. Despite Justice MARKMAN's aversion to it, this dynamic does not contravene the theory that an oral loan is due on demand and accrual occurs at demand. It seems that Justice MARKMAN's perception of an anomalous result is caused by something he already accepts: if "no time is set for the repayment of borrowed money, the loan is impliedly payable on demand." *Ante* at 221-222, citing *Colburn*. Indeed, *Colburn*'s holding necessarily puts the lender in a position to set when payment is due. Thus, Justice MARKMAN is correct to note that this rule can conceivably lead to an oral loan being due in any length of time, as set by the lender. If this is what concerns Justice MARKMAN, it is *Colburn* that causes his consternation, not my application of *Smith Estate*. Nonetheless, I can sympathize with him because I too sense a conflict between the statute of limitations and a lender being free to harbor his claim indefinitely by not making a demand. Yet I do not think that the solution to this concern is to force the oral-loan square peg into the demand-note round hole. But that is what Justice MARKMAN does by insisting, against reason, that an oral loan is legally the same as a "demand note," which by its mere name indicates a demand upon delivery. See the discussion later in this opinion. Instead, I find the *Smith Estate* construct to be much more applicable here because it was actually espoused to deal with this very issue. It handles the concern that Justice MARKMAN and I share because it precludes lenders

Finally, Justice MARKMAN adopts his immediate-accrual construct by incorporating the holding from *Palmer v Palmer*, 36 Mich 487 (1877). While conceding that *Palmer* and its progeny "addressed written demand notes," Justice MARKMAN concludes that "there is no apparent reason why *Palmer* should not equally apply to an oral contract." *Ante* at 226. I respectfully note several reasons why *Palmer* should not apply to oral contracts like those in this case.

Palmer, a case concerning a promissory note, held that "a *note* payable on demand is payable at once and without demand, so that the statute [of limitations] runs from its delivery." *Palmer*, 36 Mich at 491 (emphasis added). This Court has defined a promissory note as "a *written unconditional promise* by one person to pay to another person therein named . . . a fixed sum of money . . . ." *Parker v Baldwin*, 216 Mich 472, 474; 185 NW 746 (1921) (emphasis added). Further, "[n]o contract or agreement is a promissory note which does not provide for the payment of money, *absolutely and unconditionally*." *Id.* (emphasis added). Thus, a promissory note is more than a contract to repay a loan: it is a *written instrument* that embodies a formal promise to repay. See MCL 440.9102(1)(uu) and (mmm); MCL 440.3104. The case at hand, however, involves informal oral contracts, which do not meet the strict formalities of a promissory note. Therefore, in determining when the period of limitations begins to run on an oral contract that does not specify the terms for repayment, this Court should apply caselaw dealing with general

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from extending accrual of their claims indefinitely by only allowing such an extension for up to six years. Moreover, it avoids having the necessity of accepting the illogical premise that, when an oral request to borrow money is accepted, repayment is due at the instant the lender hands the money over to the borrower.

breach of contract actions, such as *Smith Estate*, rather than those cases that deal with the hypertechnical code of negotiable instruments.

In addition, the only justification that Justice MARKMAN gives for applying *Palmer* is that doing so is supported by the policies that underlie the statute of limitations. While I agree with Justice MARKMAN that those policies are strongly implicated when dealing with an oral agreement, *Smith Estate* properly addressed this issue without subjecting informal oral agreements to the more stringent rules regarding promissory notes. See *Smith Estate*, 91 Mich at 11-12.

Also, unlike the parties in *Palmer*, the parties here did not formulate a written unconditional promise to repay within 30 days after demand. See *Palmer*, 36 Mich at 490. In contrast, here there were merely oral requests to borrow money, which prompted plaintiff to write 11 checks over a span of several years. While plaintiff expected that she would be repaid, there were no specific agreements about repayment or promises to repay the borrowed funds. Thus, as noted, in contrast to Justice MARKMAN's assertion, there were no "express terms" of the contracts that contemplated immediate payment.

Finally, applying *Palmer*'s view that the period of limitations begins to run on the date of delivery, and therefore no demand is necessary, is inconsistent with this Court's declarations regarding basic contract principles. In essence, *Palmer* puts the oral-contract borrower in immediate breach of the contract and thus makes a loan that had no specified time set for repayment due immediately. This conflicts with our pronouncement that "when a contract is silent as to time of performance or payment, absent any expression of a contrary intent, the law will presume a reasonable time." *Duke v Miller*, 355 Mich 540, 543; 94 NW2d 819

(1959). Moreover, application of *Palmer* here contravenes common sense: informal oral loans are handshake agreements that intuitively are not breached at the time of the handshake. It would be nonsensical to assume that informal loans that consisted of thousands of dollars would be due immediately, as they would be under *Palmer*. My application of *Smith Estate* does not subject informal oral handshake-type agreements to the strict formalities of promissory notes, and it is consistent with this Court's pronouncements regarding basic contract principles.

In sum, Justice MARKMAN's construct represents one end of the spectrum on this issue. He would have accrual occur at the inception of the loan, which I think would prematurely trigger the running of the period of limitations because it contradicts both the facts of this case and this Court's general pronouncements on oral contracts. In essence, Justice MARKMAN gives the interests supporting the statute of limitations too much weight. Justice YOUNG, in contrast, represents the other end of the spectrum. Under his construct, the purposes of the statute of limitations are given too little respect because a claimant can extend the accrual of his claim indefinitely. I recognize that both constructs represent good-faith attempts to balance the tenets of statutes of limitations with the countervailing principles of contract law. However, I find them both to be out of balance. I think that applying *Smith Estate* to this issue achieves the best balance between the concern of ensuring that contracts will be enforced and the competing concern that claims will not become stale.

III. CONCLUSION

For all these reasons, I would reverse the judgment of the Court of Appeals on both issues.

KELLY, C.J., concurred with CAVANAGH, J.

WEAVER, J. I believe that leave to appeal was improvidently granted in this case because the result reached by the Court of Appeals in this case is correct.

HATHAWAY, J., concurred with WEAVER, J.

HUNTER v HUNTER

Docket No. 136310. Argued March 3, 2009 (Calendar No. 2). Decided July 31, 2009.

Robert and Lorie Hunter, the guardians of four minor children of Tammy Jo and Jeff Hunter, filed in the Oakland Circuit Court, Family Division, a complaint and motion seeking legal and physical custody of the children. The plaintiffs, the brother and sister-in-law of Jeff, had been appointed guardians after a period during which Tammy Jo and Jeff were unable to care for their children because of their use of crack cocaine. After the plaintiffs were appointed guardians, Tammy Jo (hereafter the defendant) sought and was granted visitation opportunities that were contingent on her ability to verify her drug-free status, maintain employment, and pay child support. She complied with the requirements and was granted additional opportunities for visitation. A hearing referee determined that the children had an established custodial environment with the plaintiffs and that the defendant was an unfit parent. The defendant objected and requested a hearing de novo. The court, Linda S. Hallmark, J., conducted a hearing and determined that the defendant was not a fit parent. Following a hearing to determine the best interests of the children, the court determined that it was in the children's best interests to remain with the plaintiffs and granted the plaintiffs physical and legal custody. The court ordered the defendant to pay child support and part of the plaintiffs' attorney fees. The Court of Appeals granted the defendant leave to appeal and, in an unpublished opinion per curiam, issued March 20, 2008 (Docket No. 279862), the Court, SAAD, C.J., and BORRELLO, J. (GLEICHER, J., dissenting), affirmed the custody determination, but reversed the award of attorney fees. The Supreme Court granted the defendant's application for leave to appeal, limited to the following issues: "(1) whether the standard for parental fitness in *Mason v Simmons*, 267 Mich App 188, 206 (2005), and the courts' application of *Mason* here violate a natural parent's fundamental right to his or her child, see *Troxel v Granville*, 530 US 57 (2000); (2) if a natural parent is found to have been unfit under the appropriate standard and his or her lack of fitness led to the child's established custodial environment with a third party, whether the parent's later fitness at the time he or

she seeks custody is relevant to a proper fitness determination; (3) whether the lower courts in this case properly applied the presumption in the Child Custody Act favoring the children's established custodial environment, MCL 722.27(1)(c), instead of the presumption in favor of natural parents, MCL 722.25(1), compare *Heltzel v Heltzel*, 248 Mich App 1 (2001); (4) whether the trial court's finding of parental unfitness here was against the great weight of the evidence; and (5) whether the trial court's determination regarding the best interests of the children were against the great weight of the evidence." 482 Mich 981 (2008).

In an opinion by Chief Justice KELLY, joined by Justices CAVANAGH, YOUNG, MARKMAN, and HATHAWAY, the Supreme Court *held*:

1. The parental presumption in MCL 722.25(1) prevails over the presumption in favor of an established custodial environment in MCL 722.27(1)(c). The parental presumption can be rebutted only by clear and convincing evidence that custody with the natural parent is not in the best interests of the child. The presumption in MCL 722.25(1) satisfies constitutional scrutiny under the minimum protection established in *Troxel* against state intrusion into the parenting decisions of fit parents. The presumption in MCL 722.25(1) provides sufficient deference to a fit natural parent's fundamental rights to the care, custody, and management of the parent's child. Although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a presumption of validity or some weight. This is what MCL 722.25(1) does when it requires clear and convincing evidence to rebut the presumption.

2. MCL 722.25(1) applies to all natural parents who are parties in custody disputes with third parties, not merely fit natural parents. The *Mason* Court erred by holding that the statutory parental presumption in the natural parent's favor applies only to fit parents. *Mason* must be overruled. Due process does not require a threshold determination of parental fitness in custody cases.

3. Collateral estoppel principles provide a sufficient basis to preclude parents from initiating an action for custody under the Child Custody Act in order to circumvent valid court orders affecting custody.

4. The judgment of the Court of Appeals must be reversed and the case must be remanded to the trial court for a new best-interest hearing in which the court must consider all relevant up-to-date information. The court must apply MCL 722.25(1) in the defendant's favor at the hearing. The court may not grant

custody to the plaintiffs unless they demonstrate by clear and convincing evidence that custody with the defendant would not be in the children's best interests. In order to make this showing, the plaintiffs must prove that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best-interest concerns in MCL 722.23, taken together, clearly and convincingly demonstrate that the children's best interests require placement with a third person.

Reversed and remanded.

Justice WEAVER, concurring in part and dissenting in part, agreed with the reversal of the Court of Appeals' judgment and with the remand to the trial court for a new best-interest hearing for the reasons stated by Chief Justice KELLY in parts I, II, and III(B) and (D) of the majority opinion and by Justice CORRIGAN in part III (except footnote 12) of her partially concurring and partially dissenting opinion.

Justice CORRIGAN, concurring in part and dissenting in part, concurred with parts I, II, and III(B) and (D) of the majority opinion and noted her agreement with the majority's conclusion that fit parents benefit from a constitutional presumption that they will act in the best interests of their children and that, when prior court proceedings govern child custody, those proceedings generally have preclusive effect and the prior court has superior jurisdiction. A parent cannot circumvent these proceedings by seeking custody under the Child Custody Act, MCL 722.21 *et seq*. Justice CORRIGAN disagreed with the majority that the constitutional presumption in favor of a fit parent imbues the presumption in MCL 722.25(1)—which applies to all parents, not just fit parents—with heightened constitutional meaning so that it always prevails over the mandate concerning established custodial environments in MCL 722.27(1)(c). Although constitutional considerations require the presumption in MCL 722.25(1) to predominate in the case of a fit parent, when a parent's lack of fitness has been previously established or admitted and a third party has an established custodial environment with the child, the parent should not benefit from the presumption in MCL 722.25(1) and the mandate in MCL 722.27(1)(c) governs instead. The majority is correct in stating that even when a custody action is properly filed by a guardian under MCL 722.26b, as here, the trial court is not bound to award custody to any party and may act in the best interests of the child under MCL 722.27(1). Therefore, the trial court at its discretion may dismiss the plaintiffs' custody action in light of their apparent attempt to subvert the ongoing guardian-

ship proceedings in which the defendant was fulfilling increasing duties owed to her children and gaining increased visitation time.

1. PARENT AND CHILD — CHILD CUSTODY — PARENTAL PRESUMPTION — ESTABLISHED CUSTODIAL ENVIRONMENT PRESUMPTION.

The parental presumption contained in MCL 722.25(1) prevails over the presumption in favor of an established custodial environment contained in MCL 722.27(1)(c) in an action in which both presumptions apply.

2. PARENT AND CHILD — CHILD CUSTODY — PARENTAL PRESUMPTION.

The presumption in MCL 722.25(1) that in a custody dispute between a parent and an agency or third person the court shall presume that the best interests of the child are served by awarding custody to the parent applies to all natural parents who are parties, not merely fit natural parents; the presumption applies unless the contrary is established by clear and convincing evidence.

Scott Bassett and *Law Offices of Victor and Victor PLLC* (by *Daniel Victor*) for Robert and Lorie Hunter.

Saraphoena B. Koffron for Tammy Jo Hunter.

Amici Curiae:

Holli J. Wallace PLLC (by *Holli J. Wallace*) and *Amal M. Bass* for the California Women's Law Center, the Connecticut Women's Education and Legal Fund, the Northwest Women's Law Center, and the Women's Law Project.

Michigan Poverty Law Program (by *Rebecca E. Shiemke*), Legal Services of South Central Michigan (by *Susan L. Hartman* and *Elizabeth E. Rios*), and Family Law Project (by *Rebecca K. Ellis*) for the Michigan Coalition Against Domestic and Sexual Violence.

Deana Pollard Sacks and *Karen E. Groenhout* for the Center for Effective Discipline, the National Coalition to Abolish Corporal Punishment in Schools, and End Physical Punishment of Children.

Carlo Martina and *Anne Argiroff* for the Family Law Section of the State Bar of Michigan.

Ashley E. Lowe, *Robert A. Sedler*, *Michael J. Steinberg*, and *Kary L. Moss*, for the American Civil Liberties Union Fund of Michigan.

KELLY, C.J. This child custody case requires us to examine (1) the scope of the constitutional rights of natural parents in raising their children, (2) how provisions of Michigan's Child Custody Act (CCA)[1] interact with those rights, and (3) whether the circuit court in this case applied the correct legal standards (a) in finding defendant,[2] the children's biological mother, to be an unfit parent and (b) in awarding legal and physical custody of her four children to the children's paternal uncle and his wife.

We conclude that the circuit court did not apply the correct legal standards. We also overrule *Mason v Simmons*,[3] which the lower courts relied on, because its holding is inconsistent with the statutory language of the CCA and inconsistent with longstanding principles of Michigan custody jurisprudence. Therefore, we reverse the judgment of the Court of Appeals and remand the case to the circuit court for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In 2002, Tammy Jo Hunter and her husband, Jeff Hunter, lived in Indiana with their four young children, who ranged in age from two to nine years. There is no evidence in the record that Indiana child welfare authorities ever investigated or sought jurisdiction over

[1] MCL 722.21 *et seq*.

[2] "Defendant" herein refers to appellant Tammy Jo Hunter.

[3] *Mason v Simmons*, 267 Mich App 188; 704 NW2d 104 (2005).

the family. Tammy and Jeff began using crack cocaine. In August 2002, Tammy left her four children in Jeff's care at home and did not return for six days. During her absence, Jeff contacted his brother and sister-in-law in Michigan, plaintiffs Robert and Lorie Hunter, and requested their assistance. Robert drove to Indiana, collected the children, and returned to Michigan.

Two months later, Tammy and Jeff came to Michigan and retrieved their children, claiming that they had successfully overcome their drug addictions. A short time later, however, plaintiffs learned that Tammy and Jeff had relapsed. Plaintiffs again drove to Indiana and brought the children to Michigan. Robert testified that he and Lorie told Tammy and Jeff that "we were taking the kids . . . and told them they had to give us the kids and sign these guardianship papers." Tammy signed papers establishing a limited guardianship with plaintiffs.

Seven months later, in May 2003, Tammy and Jeff petitioned the Oakland Circuit Court to terminate plaintiffs' guardianship. However, they failed to appear at a June 2003 hearing because they were again using cocaine. On July 1, 2003, the circuit court dissolved the limited guardianship and appointed plaintiffs full guardians of the children.

Tammy's life further deteriorated when she was incarcerated in August 2004. She was released from prison in April 2005 and, three months later, filed a petition in the Oakland Circuit Court seeking an opportunity to visit her children.[4] The circuit court required her to verify her drug-free status since her release from prison. She was required to undergo biweekly drug

[4] Tammy obtained a divorce from Jeff while he was incarcerated in Indiana. Jeff has been incarcerated on and off since 2003 and was never a party to this appeal.

testing, attend Alcoholics Anonymous or Narcotics Anonymous meetings, and maintain weekly telephone contact with her children. She complied with each of these requirements.

On November 9, 2005, the circuit court ordered Tammy to begin paying child support and allowed supervised visits with the children. At a review hearing conducted six months later, the circuit court noted that Tammy's visitation had gone well and that she regularly paid child support. The circuit court expanded her parenting time, awarding her unsupervised weekend visits in Michigan during May and June 2006 and overnight, unsupervised visits in Indiana beginning in July 2006. The court also continued her child support obligation and ordered her to submit to weekly drug screens. She again met each of the court's requirements. By the time this case was filed, Tammy was having monthly unsupervised weekend visits with the children at her Indiana home and in Michigan.

In May 2006, plaintiffs filed this action seeking legal and physical custody of the children. The parties stipulated that the Friend of the Court (FOC) referee would make a preliminary finding regarding the children's established custodial environment and whether Tammy was a "fit parent," using *Mason v Simmons* "as its guide."

The referee determined that the children had an established custodial environment with plaintiffs and that Tammy was an unfit parent. Tammy filed objections to the referee's report and requested a hearing de novo. Ten days after receiving the referee's report, the circuit court entered another order. It required Tammy to attend parenting classes, submit to random drug screens, participate in substance abuse counseling, and attend family counseling sessions with her children and her live-in boyfriend. Tammy again complied with all requirements.

At the evidentiary hearing, several witnesses testified regarding the circumstances in 2002 and 2003 that led to the establishment of plaintiffs' guardianship of the children. Tammy testified that she had remained drug-free since August 2004 and supplied the court with a compendium of negative drug screen reports. She also testified that she earned $10.50 an hour as an assistant sales manager and lived with her boyfriend in a four-bedroom home in Indiana. A family therapist who had evaluated the children pursuant to a circuit court order reported that the children were "attached" to Tammy and "have a preference to move [in] with her full time."

The circuit court concluded that Tammy was not a fit parent. In its bench ruling, the court gave its reasons:

> Now, as to the issue of mom's fitness.
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> I believe that mom is a very nice person.
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> That she loves these children very dearly and I think they love her.
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> And I'm impressed by the progress that she has made.
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> But I don't believe that her love for the children is equivalent to being a fit parent.
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> When we look at the definition of fitness, it's not about whether she's a nice person, it is not about whether today she has made progress—and, again, she has made progress—it is about what happened in conjunction with these kids.
>
> And in 2002 the parents were drug addicted.
>
> They could not provide a home for the children and the family intervened and rather than having [Children's Protective Services] involvement and have these children go to foster care the family took over and stepped in and provided a stable and loving home for these four kids, it doesn't happen very often and it's wonderful when that

does happen and I think, again, these kids are doing as well as they are today because of that intervention.

And mom has made progress but there are still numerous questions and numerous issues.

These kids have never really lived with her for the last five years.

And in Dr. [Jerome] Price's report he talks about that, that they regard going to mom's as vacation time.

They have not had to do the grueling, day to day, sort of parenting and be tested that way so we can make some determination about what the current situation is.

And mom lives with a man, who seems like a very nice individual also, a hard working person, but they live in an out of wedlock relationship and exposing the children to an out of wedlock relationship, given all of the other instability of their lives at this point is questionable judgment.

I heard his testimony that he's listed her as a beneficiary on his life insurance and he expects that he will leave her his assets should he pass away.

But the truth of the matter is she has no legal rights as a live together person.

There is a reason that we have marriage in this society and marriage protects her.

The relationship she is in gives her no protection and if at any time Mr. McConnell wants to tear up the letter, change the beneficiary, move out, he, of course is free to do so, as she is, and there are no legal ramifications to that.

So she is not really very well protected and without his assistance she cannot maintain the children.

She's been in a home for six months; that's a lease home and she admitted herself that she could not possibly maintain the children financially without Mr. McConnell being there and without his financial assistance.

> So I think she has made terrific strides but I don't think she's at a point yet where we can say she is able to provide a stable and secure home for these four children, who have been out of her care for five years.
>
> So I don't believe that's the definition of fitness.

The court then held a best interests hearing. After considering the testimony, the court agreed with the referee's findings. The court determined that 9 of the 12 best interest factors[5] favored plaintiffs and that the parties were equal with respect to 2 of the factors.[6] The court also stated on the record that it had "taken into consideration" the remaining factor, the reasonable preference of the children,[7] in reaching its decision. The court held that it was in the children's best interests to remain with plaintiffs and granted them physical and legal custody. It also ordered Tammy to pay child support and $4,000 of plaintiffs' attorney fees. The court later denied Tammy's motion for reconsideration.

Tammy filed an application for leave to appeal in the Court of Appeals. In a split, unpublished decision, the Court of Appeals majority affirmed the custody determination, but reversed the award of attorney fees.[8] Judge GLEICHER dissented. She would have reversed the custody determination because the circuit court's decision regarding parental fitness was unconstitutional and against the great weight of the evidence. We granted leave to appeal.[9]

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[5] MCL 722.23(b), (c), (d), (e), (f), (g), (h), (j), and (*l*).

[6] MCL 722.23(a) and (k).

[7] MCL 722.23(i).

[8] *Hunter v Hunter*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2008 (Docket No. 279862).

[9] *Hunter v Hunter*, 482 Mich 981 (2008).

II. LEGAL BACKGROUND

We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a statute.[10] Findings of fact in child custody cases are reviewed under the great weight of the evidence standard.[11]

The central issues in this case are (1) what is the proper application of MCL 722.25(1) and MCL 722.27(1)(c); and (2) do the federal constitutional standards concerning the fundamental rights of parents to raise their children control our answer to the first question?

A. UNITED STATES SUPREME COURT PRECEDENT

The importance of the family and the "essential," "basic," and "precious" right of parents to raise their children are well established in United States Supreme Court jurisprudence.[12] This right is not easily relinquished. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[13] Therefore, to satisfy constitutional due process standards, the state "must provide the parents with fundamentally fair procedures."[14]

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[10] *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 5; 658 NW2d 127 (2003).

[11] MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994).

[12] *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), quoting *Meyer v Nebraska*, 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923), *Skinner v Oklahoma*, 316 US 535, 541; 62 S Ct 1110; 86 L Ed 1655 (1942), and *May v Anderson*, 345 US 528, 533; 73 S Ct 840; 97 L Ed 1221 (1953).

[13] *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

[14] *Id.* at 753-754.

In 2000, in the case of *Troxel v Granville*,[15] the United States Supreme Court delivered its most relevant pronouncement in this area of the law. In a plurality opinion, the Court struck down the state of Washington's "breathtakingly broad" visitation statute as an unconstitutional infringement on the fundamental right of parents to rear their children.[16] The statute authorized " 'any person' " to petition for visitation rights and authorized state courts to grant such visitation whenever it " 'may serve the best interest of the child.' "[17]

B. APPLICABLE MICHIGAN LAW

In 1970, the Michigan Legislature enacted the CCA. Among its provisions are statutory presumptions that apply in custody disputes. The presumptions pertinent to this case are found in MCL 722.25(1) and MCL 722.27(1)(c). MCL 722.25(1) states:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is shown by clear and convincing evidence.

MCL 722.27(1)(c), by contrast, provides in part:

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[15] *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000).

[16] *Id.* at 67. *Troxel* also included forceful language describing the significance of parents' fundamental liberty interest in the care, custody, and control of their children. It noted that this interest "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65, citing *Meyer*, 262 US at 399, 401.

[17] *Troxel*, 530 US at 67.

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

Thus, a conflict arises between these sections when a court hears a custody dispute between a child's natural parent and a third party with whom the child has an "established custodial environment." This Court has not addressed the proper application of these sections of the CCA in such cases.

On numerous occasions before *Troxel* was decided, the Court of Appeals considered the interplay of these two presumptions. Panels of the Court came to conflicting conclusions about how to reconcile them.[18] However,

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[18] Compare *Rummelt v Anderson*, 196 Mich App 491; 493 NW2d 434 (1992), and *Glover v McRipley*, 159 Mich App 130; 406 NW2d 246 (1987) (cases in where presumptions were applicable, holding that the natural parent has the burden and that he or she must prove by a preponderance of the evidence that the best interests of the child are served by

after *Troxel*, in *Heltzel v Heltzel*, the Court recognized that, to properly protect a parent's fundamental liberty interest, the presumption of MCL 722.25(1) in favor of the natural parent must control.[19]

Heltzel further concluded that it was imperative that trial courts balance the two significant interests. First, the lower courts must adequately safeguard the fundamental constitutional nature of the parental liberty interest. Second, they must simultaneously maintain the statutory focus of the CCA on the best interests of the child. To achieve this balance, *Heltzel* held:

> [C]ustody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.[20]

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placement with the parent), with *Deel v Deel*, 113 Mich App 556; 317 NW2d 685 (1982), *Siwik v Siwik*, 89 Mich App 603; 280 NW2d 610 (1979), *Stevens v Stevens*, 86 Mich App 258; 273 NW2d 490 (1978), and *Bahr v Bahr*, 60 Mich App 354; 230 NW2d 430 (1975) (holding that the parental presumption controls unless the third party shows by clear and convincing evidence that custody with the natural parent is not in the best interests of the child).

[19] *Heltzel v Heltzel*, 248 Mich App 1, 26-27; 638 NW2d 123 (2001) ("We do not believe, however, that the Legislature intended that in every custody dispute between a noncustodial natural parent and a third-person custodian, the third-person custodian could eliminate the fundamental constitutional presumption favoring custody with the natural parent, and thus arrive on equal footing with the parent with respect to their claim of custody to the parent's child, merely by showing that the child had an established custodial environment in the third person's custody. This interpretation . . . fails to take into proper account the parents' fundamental due process liberty interest in childrearing.").

[20] *Id.* at 27.

The Court of Appeals thoroughly considered *Heltzel*'s analysis when it decided *Mason*. It noted that no published Court of Appeals case had addressed the applicability of *Heltzel* in cases in which a natural parent was unfit or had neglected or abandoned a child.[21]

Without citing authority to support its conclusion, *Mason* then distinguished *Heltzel*, saying that it applies only to custody disputes involving fit parents. It held that when "a parent's conduct is inconsistent with the protected parental interest, that is, the parent is not fit, or has neglected or abandoned a child, the reasoning and holding of *Heltzel* do not govern."[22] *Mason* thus affirmed the trial court's determination that the defendant was not entitled to the constitutional deference afforded a fit parent under *Heltzel* and *Troxel*. It extended that reasoning to justify denying the natural parent the benefit of the statutory presumption in MCL 722.25(1).

III. THE CCA'S PROTECTIONS

Custody cases involving natural parents inherently implicate the parents' fundamental liberty interest in the care, custody, and management of their children.[23] Thus, they implicate the constitutional protections identified in the United States Supreme Court cases previously discussed. The threshold question this Court must address is whether the relevant provisions of the CCA adequately protect a fit parent's fundamental rights under existing United States Supreme Court precedent.

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[21] *Mason*, 267 Mich App at 198.

[22] *Id.* at 206.

[23] *Santosky*, 455 US at 753.

A. UNDER *TROXEL*, MCL 722.25(1) MUST CONTROL OVER MCL 722.27(1)(c) IN ORDER TO ADEQUATELY PROTECT FIT PARENTS' FUNDAMENTAL RIGHTS

Troxel established a floor or minimum protection against state intrusion into the parenting decisions of fit parents. It invalidated the state of Washington's third-party visitation statute as a violation of a natural parent's fundamental rights. It reasoned that the Washington statute was flawed because it afforded no deference to a fit parent's decision about his or her children's best interests.[24] Rather, the statute allowed "any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."[25] *Troxel* also forbade courts from overturning decisions by a fit custodial parent based "solely on the judge's determination of the child's best interests."[26] Rather, it held that courts must give some "special weight" to the parents' determination of their children's best interests.[27]

The constitutional protection in *Troxel* centers on the "traditional presumption that a fit parent will act in the best interest of his or her child."[28] The Washington statute's lack of deference to a fit parent's decision was inconsistent with the presumption that fit parents act in the best interests of their children. Hence, it was constitutionally infirm. Using that reasoning, *Troxel* established that a natural parent's fitness to parent is the touchstone for invoking the constitutional protections of fundamental parental rights. The application of the statutory presumption in MCL 722.25(1) must

[24] *Troxel*, 530 US at 67.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 70.

[28] *Id.* at 69.

therefore be considered specifically in the context of a fit parent to determine whether it satisfies constitutional scrutiny under *Troxel*.

In *Heltzel*, our Court of Appeals recognized *Troxel*'s mandate: In order to protect a fit natural parent's fundamental constitutional rights, the parental presumption in MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c). We agree.

Several considerations compel this conclusion. First, *Troxel* explicitly requires courts to give some deference to a parent's decision to pursue custody because it is inherently central to the parent's control over his or her child.

By contrast, unlike the parental presumption in MCL 722.25(1), no constitutional protections for third persons underlie the established custodial environment presumption in MCL 722.27(1)(c). This Court has held that no constitutional or statutory basis exists for third parties to have standing to seek child custody solely because they have an established custodial relationship with the child.[29]

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[29] *Bowie v Arder*, 441 Mich 23, 43; 490 NW2d 568 (1992) (rejecting the argument that the CCA created a substantive right of a third party to seek custody of a child with whom the third party has an established custodial relationship and observing that "[t]here is simply no provision of the [CCA] that can be read to give a third party . . . a right to legal custody of a child on the basis of the fact that the child either resides with or has resided with that party"); *In re Clausen*, 442 Mich 648, 682-684; 502 NW2d 649 (1993) (rejecting the argument that United States Supreme Court precedent established a federal constitutional right of a third party to seek custody of a child with whom the third party has an established custodial relationship).

We note that plaintiffs have standing to pursue this custody action by virtue of their status as the children's legal guardians. MCL 722.26b(1).

Finally, we note that the vast majority of Michigan cases interpreting the CCA support the conclusion that these presumptions were not meant to be given equal weight.[30] This conclusion is also in accord with Michigan's longstanding history of affording great respect to parental authority while consistently recognizing that the best interests of the child control the analysis.[31] For these reasons, we conclude that, when these presumptions conflict, the presumption in MCL 722.27(1)(c) must yield to the presumption in MCL 722.25(1).[32]

A remaining constitutional question involves the amount of deference due under *Troxel* to fit parents. We conclude that the statute provides sufficient deference to a fit natural parent's fundamental rights to the "care, custody, and management of their child . . . ."[33]

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[30] *Bowie*, 441 Mich at 43 (holding that an established custodial environment does not establish a substantive basis on which to sue for custody under the CCA); *Deel*, 113 Mich App at 561 ("*Stevens* holds that the presumptions should be *recognized* equally, not *weighted* equally, and the language used in the statutes suggests that the presumptions are not, in fact, of equal weight.") (emphasis in original). The few cases that have held otherwise have since been rejected as unconstitutional under *Troxel*. E.g., *Heltzel*, 248 Mich App at 21-23 ("reject[ing]" *Rummelt* and declining to follow its "unconstitutional[]" application of the CCA). *Rummelt* and its predecessors had resolved the conflict in the statutory presumptions. They said that the natural parent must show by a preponderance of the evidence that removing the child from an established custodial environment was in the child's best interests.

[31] *Fletcher*, 447 Mich at 889 ("[T]he primary goal of the Child Custody Act . . . is to secure custody decisions that are in the best interests of the child."); *Greene v Walker*, 227 Mich 672, 677-681; 199 NW 695 (1924) (citing cases).

[32] " '[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.' " *Bowerman v Sheehan*, 242 Mich 95, 99; 219 NW 69 (1928), quoting Justice Holmes in *Blodgett v Holden*, 275 US 142, 148; 48 S Ct 105; 72 L Ed 206 (1927).

[33] *Santosky*, 455 US at 753.

We so hold because the statute requires, in order to rebut the parental presumption, clear and convincing evidence that custody by the natural parent is not in a child's best interests.

The clear and convincing evidence standard is "the most demanding standard applied in civil cases . . . ."[34] This showing must " 'produce[] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' "[35]

We agree with the Court of Appeals in *Heltzel* that, given the unique constitutional considerations in custody disputes involving natural parents, "it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him."[36] A third party seeking custody must meet a higher threshold. He or she must establish by clear and convincing evidence that it is not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody. This is entirely consistent with *Troxel*'s holding. Although a fit parent is presumed to act in his or her child's best interests, a court need give the parent's decision only a "presumption of validity" or "some weight." That is precisely what MCL 722.25(1) does when it requires clear and convincing evidence to rebut the presumption.

Given our determination that (1) the parental presumption in MCL 722.25(1) prevails over the presump-

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[34] *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

[35] *Id.* (citations omitted).

[36] *Heltzel*, 248 Mich App at 28.

tion in favor of an established custodial environment in MCL 722.27(1)(c) and that (2) the parental presumption can be rebutted only by clear and convincing evidence that custody with the natural parent is not in the best interests of the child, we conclude that MCL 722.25(1) satisfies constitutional scrutiny under *Troxel*.[37]

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[37] Our constitutional analysis is further supported by a comparison with similar statutes in other states. The CCA's provisions governing custody disputes between a natural parent and a third party are more deferential to the natural parent than some, but less deferential than others. Michigan appears to fall near the middle of the spectrum. At one end are the strict "parental rights" jurisdictions, which base a parent's right to custody on the fitness of the parent. At the opposite end are the "best interests" jurisdictions, which base custody exclusively on the child's needs and welfare. The standards in between usually give preference to the biological parent through a rebuttable presumption that the best interests of the child are served by giving custody to the natural parent. See, generally, Anno: *Award of custody where contest is between child's parents and grandparents*, 31 ALR3d 1187, 1197-1198; *In re Guardianship of Jane Doe*, 93 Hawaii 374, 384-385; 4 P3d 508 (Hawaii App, 2000).

Under the doctrine most deferential to natural parents, the parents are entitled to the custody of their children unless (1) it clearly appears that they are unfit, (2) they have abandoned their right to custody, or (3) "extraordinary circumstances" exist that require they be deprived of custody. *Id.*; *Ex parte GC*, 924 So 2d 651, 656 (Ala, 2005) (requiring "clear and convincing evidence" of parental unfitness to rebut the presumption in favor of the natural parent) (citations omitted); *State ex rel KF*, 2009-UT 4, ¶ 67; 201 P3d 985, 1000 (2009) (requiring evidence of three factors establishing unfitness in order to rebut the presumption in favor of the natural parent). Most courts using this standard rarely evaluate the best interests of the child when resolving the issue. Rebutting the parental presumption in the states using this standard typically hinges on a determination of unfitness. Hence, this standard undoubtedly provides sufficient deference to a natural parent's decisions regarding the care, custody, and maintenance of his or her child to satisfy *Troxel*.

Michigan, along with many other states, applies an intermediate parental presumption standard that favors the biological parent. It is rooted in the *Troxel* rationale that custody with the natural parent serves the best interests of the child. Usually, nonparents may rebut the

B. *TROXEL* DOES NOT REQUIRE A THRESHOLD DETERMINATION OF PARENTAL FITNESS IN CUSTODY CASES IF NO STATUTORY REQUIREMENT EXISTS

Defendant and some of the amici curiae argue that this Court must read into the statute an implicit requirement for a fitness determination in order to protect parents' fundamental rights. Even if the presumption in MCL 722.25(1) supersedes the presumption in MCL 722.27(1)(c), defendant argues that the court must make a preliminary determination whether a natural parent is a fit parent. Thus, defendant insists, *Troxel* prevents courts from allowing a third party to rebut the presumption using a best interests analysis because it would insufficiently protect the parent's rights.

Defendant relies on *In re JK* in support of her argument. In that case, this Court stated that "[a]

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presumption favoring the parent only by a showing of clear and convincing evidence that custody with the natural parent is not in the child's best interests. MCL 722.25(1); *In re Guardianship of Doe*, 93 Hawaii at 385.

The standard least deferential to the natural parent's wishes is often referred to simply as the "best interests of the child standard." It focuses on the interests of the child and defines the relative benefits to the child of being with one or the other party. It requires the court to compare the totality of the circumstances of the two potential custodians, usually on the basis of statutory considerations similar to those embodied in MCL 722.23. Courts using this standard typically grant custody by determining, by a preponderance of the evidence, which placement is in the best interests of the child.

The states that use this best interests of the child standard often give some deference to the natural parent. But they are less deferential to the natural parent's wishes than Michigan is in MCL 722.25(1). For example, Or Rev Stat 109.119 (2007) provides a parental presumption. But it allows a third party having an established parent-child relationship with the child to rebut it. The third party need produce a mere preponderance of the evidence that granting custody to the third party is in the best interests of the child. The Oregon Supreme Court upheld the statute in the face of a due process challenge based on *Troxel*. *In re Marriage of O'Donnell-Lamont*, 337 Or 86; 91 P3d 721 (2004).

due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness."[38] Defendant urged us to examine the Probate Code, the juvenile code, and other sections of Michigan law to adopt a test for evaluating parental fitness. She claims that, to satisfy constitutional scrutiny, such a test must be based on objective factors similar or identical to those listed in those statutes.

We reject defendant's arguments as beyond the scope of the holdings of *Troxel* and *In re JK*. As noted previously, *Troxel* carefully limited the constitutional scope of the parental presumption to the extent that a court need give decisions by fit custodial parents only a "presumption of validity."[39] Since MCL 722.25(1) applies a substantial presumption of the validity of decisions by all parents, including fit custodial parents, the constitutional underpinnings of *Troxel* are satisfied.[40]

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[38] *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003), citing *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978).

[39] Other jurisdictions whose courts have considered the proper application of *Troxel* in similar legal contexts have also rejected the idea that *Troxel* mandates a determination of parental fitness. Rather, in the context of motions to terminate a guardianship or to modify custody in favor of a natural parent, many courts have distinguished *Troxel* because it "was concerned with judicial interference in the day-to-day child-rearing decisions of fit, custodial parents. . . . It did not address situations in which the parent no longer has custody." *In re MJK*, 200 P3d 1106, 1109 (Colo App, 2008), citing *In re Guardianship of LV*, 136 Cal App 4th 481, 493; 38 Cal Rptr 3d 894 (2006); see also *In re MNG*, 113 SW3d 27, 33 (Tex App, 2003).

[40] Defendant would have the Court require a demonstration of parental unfitness before allowing the parental presumption to be rebutted where no such demonstration is required by the statute. That would, in effect, give unlimited deference to all parenting decisions of parents deemed to be fit. However, "[a] determination that an individual has a fundamental right does not foreclose the State from ever limiting it." *In re RA*, 153 NH

In re JK is distinguishable from the case before us. It was a case involving termination of parental rights. Termination cases introduce a significantly heightened intrusion upon a parent's fundamental right to parent because they involve an all-or-nothing proposition: whether a parent's right to be a parent and make decisions regarding his or her child's upbringing is permanently severed. It follows logically that under circumstances where the parental interest is most in jeopardy, due process concerns are most heightened.

A custody award to a third party, by contrast, represents a lesser intrusion into the family sphere. It does not result in an irrevocable severance of parental rights or " 'a unique kind of deprivation' " that forces parents to confront the state.[41] The Legislature has addressed these concerns by requiring the state to prove parental unfitness by "clear and convincing evidence" in termination cases. It has listed specific statutory factors that it has determined make a parent per se unfit and warrant terminating his or her rights to a child.[42]

82, 102; 891 A2d 564 (2005). Such a determination is not constitutionally mandated. To hold that parental unfitness is a mandatory prerequisite to rebutting the parental presumption would be inconsistent with the CCA's emphasis on best interests and lack of reference to fitness.

We note that our interpretation of the relevant provisions of the CCA is similar to that of the courts in many jurisdictions that also utilize an intermediate parental presumption standard. *In re Guardianship of Doe*, 93 Hawaii at 385 ("Because the preference for parents established in [Hawaii Rev Stat] 571-46(1) is coupled with the best interest standard, we believe our jurisdiction is similar to the majority of jurisdictions which adopt a custody presumption in favor of parents subject to rebuttal."); *Evans v McTaggart*, 88 P3d 1078, 1085 (Alas, 2004) ("We thus hold that in order to overcome the parental preference a non-parent must show by clear and convincing evidence that . . . the welfare of the child requires the child to be in the custody of the non-parent.").

[41] *Santosky*, 455 US at 759 (citation omitted).

[42] MCL 712A.19b(3).

The quoted language from *In re JK* is inapplicable in custody cases such as this because it does not involve the "state-required breakup" of a family. In termination cases, the natural parent and the state are the parties to the action. To protect the parental interest from improper state intrusion, the Legislature requires the state to prove by clear and convincing evidence that at least one statutory ground for termination exists. Hence, the state must show that the natural parent is unfit.

In custody cases, by contrast, the state does not initiate the proceedings in which the natural parent's rights are at stake. Rather, custody determinations in cases such as this merely give "recognition to a family unit already in existence . . . ."[43] Under such circumstances, "[w]hatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that [its decision was] in the 'best interests of the child.' "[44]

Finally, we note that a natural parent's fitness is an intrinsic component of a trial court's evaluation of the best interest factors in MCL 722.23.[45] Therefore, although we hold that due process does not require a fitness determination where the statute does not mandate it, we observe that fitness is an inextricable component of the court's inquiry.

For example, MCL 722.23(f) to (g) require the trial court to compare the "moral fitness" and the "mental and physical health" of the parties. These factors reflect

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[43] *Quilloin*, 434 US at 255.

[44] *Id*.

[45] Anno, 31 ALR3d at 1196 (noting that the probable reason courts have often used the fitness and best interest inquiries interchangeably is because of "the fact that both doctrines seek the same basic objective from two different approaches").

the legislative determination that concerns about parental fitness are of paramount importance in custody determinations. Therefore, MCL 722.25(1) uses the clear and convincing evidence standard to safeguard the constitutionally protected fundamental rights of fit custodial parents, as identified in *Troxel*. MCL 722.23, on the other hand, simultaneously fulfills the legislative purpose of maintaining the focus of the inquiry on the best interests of the child.

C. *MASON* ERRONEOUSLY INTERPRETED MCL 722.25(1) BY ADDING A DETERMINATION OF FITNESS

We again note, as a preliminary observation, that MCL 722.25(1) does not refer to fitness of the natural parent as a prerequisite for applying the statutory presumption in the parent's favor. MCL 722.25(1) applies to all natural parents who are parties in custody disputes with third persons, not merely fit natural parents. Nothing in the statute explicitly or implicitly suggests that the presumption applies only in cases involving a parent adjudged to be a fit parent. Rather, we believe that, in enacting the CCA, the Legislature set forth clear best interest factors in MCL 722.23 that constitute a de facto evaluation of each individual's fitness to raise a child.[46] In doing so, the Legislature rejected the amorphous fitness/neglect/abandonment standard outlined in *Mason* by not including any reference to that standard.[47]

Mason erred by holding that the statutory presump-

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[46] It is difficult to conceive of a scenario where an unfit parent would prevail on the best interest factors.

[47] *Bahr*, 60 Mich App at 359 ("Since the Legislature is presumed to be aware of the long-standing judicial precedent affecting an area in which an exhaustive codification of the law is undertaken and enacted, we must conclude the omission was intentional."); compare MCL 712A.19b(3) (specifically providing for termination of parental rights in cases of neglect or abandonment, among other reasons).

tion in the natural parent's favor applies only to fit parents. This was an improper interpretation of *Heltzel*, *Troxel*, and the CCA generally. The statutory presumption in MCL 722.25(1) is " 'a presumption of the strongest order,' "[48] and one that "does not turn solely on the question of fitness."[49] Numerous cases decided since the CCA was enacted have agreed: the parental presumption controls unless the third party shows by clear and convincing evidence that custody with the natural parent is not in the best interests of the child.[50]

As discussed earlier in this opinion, the parental presumption has some constitutional provenance, whereas the custodial environment presumption has none. This persuades us that the parental presumption should properly control over the established custodial environment presumption.

Mason held that the parental presumption controls with regard to fit parents only because they alone are constitutionally protected. *Mason* further held that unfit parents have the burden "to show, by a preponderance of the evidence, that a change in the established custodial environment with the guardian was in the child's best interests."[51]

However, *Mason* and its predecessors created this new standard out of thin air.[52] In the case before us, the

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[48] *Deel*, 113 Mich App at 561-562, quoting *Bahr*, 60 Mich App at 359.

[49] *In re Weldon*, 397 Mich 225, 276-277; 244 NW2d 827 (1976) (opinion of COLEMAN, J.), overruled on other grounds in *Bowie*, *supra*.

[50] *Henrikson v Gable*, 162 Mich App 248, 253; 412 NW2d 702 (1987); *Stevens*, 86 Mich App at 267; *Bahr*, Mich App at 360.

[51] *Mason*, 267 Mich App at 207.

[52] *Glover*, 159 Mich App at 147 ("We believe that placing the burden of persuasion on the parent challenging an established custodial environment is better calculated to elicit the quality of testimony and evidence required by a trial court in its determination of the best interest of the child."). What remains unanswered in *Glover* is on what basis the Court

Legislature has provided us with two standards that irreconcilably conflict. Rather than resolve the conflict by divining a new standard, as *Mason* did, we believe that the better course is to decide which of the two presumptions controls.

We are convinced that the parental presumption must control. We are persuaded of this (1) by the fact that, whereas the parental presumption has some constitutional provenance, the established custodial environment presumption does not; (2) by caselaw interpreting the tension between MCL 722.25(1) and MCL 722.27(1)(c); and (3) by the lack of reference to fitness in the CCA. The Court is unwilling to restrict the parental presumption absent clear evidence from the Legislature that a restriction was intended. Moreover, the CCA's notable silence regarding fitness, abandonment, or neglect of children suggests these words should not be read into the statute.

The statutory presumption favoring natural parents is not contravened merely because the statute provides greater protection for parental rights than *Troxel* mandated as a constitutional matter. *Mason*'s contrary holding is contradictory to the weight traditionally afforded to the parental presumption.[53]

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rests this questionable proposition and why, in any event, that determination justified the invention of a new standard. See *Rummelt*, 196 Mich App at 496 ("For the reasons stated therein, we agree with this Court's decision in *Glover*.").

[53] *Mason*'s holding altered the burden of proof in that it essentially applied the best interests of the child standard to disputes between unfit natural parents and third-party custodians, in contravention of the language of MCL 722.25(1). *Mason*, 267 Mich App at 207; see footnote 37 of this opinion.

Five years after the enactment of the CCA, the Court of Appeals in *Bahr* rejected the exact argument accepted by *Mason*. *Bahr* first noted that, before the enactment of the CCA, the best interests of the child were served by awarding custody to the natural parent over a third

Because the parental presumption in MCL 722.25(1) satisfies the constitutional standards mandated for fit parents, no justification existed for *Mason* to restrict that presumption only to fit parents. Nothing in *Troxel* can be interpreted as precluding states from offering *greater* protection to the fundamental parenting rights of natural parents, regardless of whether the natural parents are fit. This rule applies here.

Defendant also argues that *Mason*'s arbitrary and subjective fitness standard, and the trial court's equally

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party "unless it could be affirmatively proven that the parent was unfit to have custody or had neglected or abandoned the child." *Bahr*, 60 Mich App at 359. After concluding that the Legislature had deliberately omitted from the CCA any fitness determination in such cases, *Bahr* plainly stated that "[r]ebuttal of the presumption in favor of parental custody no longer requires proof of parental unfitness, neglect or abandonment." *Id.* at 360.

Numerous Court of Appeals cases decided after *Bahr* cited it favorably for the proposition that, in custody cases between a natural parent and a third party, the CCA requires no fitness determination. *Stevens*, 86 Mich App at 267; *Henrikson*, 162 Mich App at 253 (1987). Oddly, *Mason* quoted the same language from *Bahr* concerning the lack of need for a fitness determination under the CCA. *Mason* noted that "some jurisdictions, including Michigan, have moved away from using the 'parental unfitness' or 'extraordinary circumstances' standards and focus on a placement's detriment to the child." *Mason*, 267 Mich App at 201. The Court also noted that the parental presumption in MCL 722.25(1) applies "in *all* custody disputes between parents and an agency or a third person." *Id.* (emphasis in original). Yet immediately after this discussion, *Mason* ignored its own correct statement of law about the statutory presumption in MCL 722.25(1). Instead, it denied the parental presumption favoring the natural father on the basis of the fact that he was not entitled to the fundamental constitutional right to raise his child. *Id.* at 203.

We recognize that *Mason* was not bound by *Bahr* and its progeny under MCR 7.215(J)(1) because they were decided before 1990. However, we refer to *Bahr* here because it correctly stated Michigan custody law after the enactment of the CCA; *Mason* did not. We agree with the interpretation of the CCA promulgated by the *Bahr* line of cases. We further agree that the *Rummelt* line of cases must be rejected on the basis of *Heltzel*'s reasoning and for the reasons discussed herein.

subjective application of that standard in this case, violated her Fourteenth Amendment[54] due process rights. She claims that, because the *Mason* standard does not utilize objective criteria for evaluating parental fitness, it lacks procedural protections sufficient to protect her due process rights. Given our holding that *Mason* improperly limited the parental presumption in MCL 722.25(1), we find it unnecessary to reach defendant's constitutional argument.

We conclude that *Mason* erred by reading a fitness requirement into the parental presumption in MCL 722.25(1). The statute is entirely silent on the issue of a parent's fitness.[55] Nothing in the statute or the CCA generally[56] suggests that parental fitness is a prerequisite to entitlement to the parental presumption in MCL 722.25(1). Because *Mason*'s holding was neither constitutionally mandated nor consistent with the statute, *Mason* is hereby overruled.

D. ADDITIONAL CONCERNS

Justice CORRIGAN's partial concurrence raises a number of issues that we believe deserve a response regarding the

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[54] US Const, Am XIV.

[55] Justice CORRIGAN acknowledges as much, *post* at 295, but brushes this "bare observation" aside. We disagree with Justice CORRIGAN's contention that we fail to "adequately consider the various proceedings at which a parent's fitness may be questioned[.]" *Post* at 295. To the contrary, we explicitly address such proceedings by holding that a natural parent whose parental rights were previously terminated or are suspended cannot initiate an action under the CCA. See pp 275-277 of this opinion.

[56] Only one provision in the CCA refers to parental fitness at all. MCL 722.27b requires a court considering whether to grant visitation time to grandparents to give deference to a fit parent's decision to deny such time. This provision was amended in 2004 in response to our decision in *DeRose v DeRose*, 469 Mich 320; 666 NW2d 636 (2003). *DeRose* held that the former version of MCL 722.27b was unconstitutional under *Troxel*.

scope of this opinion. We offer the following observations to more explicitly address what this opinion does *not* do:

(1) This case deals with custody actions initiated under the CCA involving both the parental presumption in MCL 722.25(1) and the established custodial environment presumption in MCL 722.27(1)(c). This opinion should not be read to extend beyond CCA cases that involve conflicting presumptions or to cases that involve parental rights generally but are outside the scope of the CCA.

(2) This opinion does not create any new rights for parents. The United States Supreme Court decisions regarding the constitutional rights of parents previously discussed in this opinion provide guidance that informs our analysis. This opinion does not magically grant parents additional rights or a constitutional presumption in their favor. It does not grant unfit parents constitutional rights to their children other than due process rights.

(3) Parents may not bring actions under the CCA and invoke the parental presumption in MCL 722.25(1) as an end run around previous custody determinations. We agree with Justice CORRIGAN's conclusion that [p]rinciples of collateral estoppel generally prevent a party from relitigating an issue already established in a prior proceeding."[57] This Court has long recognized the applicability of these principles to probate court orders such as the guardianship orders in this case.[58] Subsequently, we reiterated that "orders of probate courts have the force and effect of judgments and are *res judicata* of the matters involved and cannot be attacked collaterally."[59]

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[57] *Post* at 296.

[58] *Chapin v Chapin*, 229 Mich 515; 201 NW 530 (1924).

[59] *In re Ives*, 314 Mich 690, 696; 23 NW2d 131(1946).

Therefore, a parent whose rights have been terminated or suspended cannot initiate an action for custody under the CCA because it would amount to a collateral attack on the earlier proceedings. A termination order, by its nature, finds that custody with the natural parent is not in the child's best interests. A parent's only recourse in such cases is to appeal the order. A guardianship order, similarly, suspends a parent's parental rights and grants those rights in the child, including a right to physical and legal custody, to the guardian under MCL 700.5215. Thus, defendant in this case would have been collaterally estopped from initiating a custody action under the CCA. A parent's recourse under these circumstances is to file a motion to terminate the guardianship.[60]

In sum, collateral estoppel principles provide a sufficient basis to preclude parents from initiating an action for custody under the CCA in order to circumvent valid court orders affecting custody.[61]

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[60] MCL 700.5208.

[61] Given this limitation, we reject Justice CORRIGAN's assertion that we are allowing a court to sweep "findings and admissions [of unfitness] under the rug . . . ." *Post* at 298. Under Justice CORRIGAN's approach, a parent who is deemed unfit by a court or admits being unfit at any time is never entitled to benefit from the parental presumption in MCL 722.25(1). Thus, defendant in this case is not entitled to the presumption in her favor because "defendant's unfitness was clearly established at prior proceedings." *Post* at 298. Justice CORRIGAN's approach is contrary to *Fletcher*'s mandate that a court consider up-to-date information "and any other changes in circumstances" when making custody determinations. *Fletcher*, 447 Mich at 889.

Our position is not that *Fletcher* precludes a circuit court from taking into account a past finding of parental unfitness. *Post* at 297 n 13. Surely, when a court evaluates the best interest factors in MCL 722.23, a past finding may still be considered. Determinations of past, admitted unfitness are inevitably reconsidered when there are ongoing proceedings before the court. Indeed, as Justice CORRIGAN observes, "a parent's fitness or custody rights are governed by an ongoing proceeding—such as the

IV. PLAINTIFF'S BURDEN OF PROOF ON REMAND

Given our conclusion that *Mason* incorrectly interpreted MCL 722.25(1), we remand this case for reevaluation under the correct legal standards.[62] On remand, the circuit court shall conduct a new best interests

guardianship proceeding here . . . ." *Post* at 284-285. We do not ourselves opine on whether "defendant's lack of fitness here diminished . . . ." *Post* at 297 n 13. We simply observe that the judge overseeing the guardianship proceedings acknowledged such a progression in his increasingly generous visitation orders.

Thus, our main disagreement with Justice CORRIGAN's conclusion is the extent to which she would make a prior finding of unfitness largely dispositive in resolving the conflicting presumptions in the CCA. Here, plaintiffs relied primarily on defendant's past conduct as a basis for opposing her requests for increased visitation. Nevertheless, the court overseeing the guardianship proceedings repeatedly ruled in defendant's favor. During those proceedings, defendant was fulfilling increasing duties to her children and gaining increased visitation time. By complying with what the court required of her, defendant properly attempted to overcome the prior finding of unfitness that plaintiffs rely on heavily in this custody action. Indeed, had defendant filed a motion to terminate the guardianship under MCL 700.5208, her admission of unfitness would have been relevant. But the relevance would have been only to the extent that it still affected the best interests of the children. Justice CORRIGAN states that defendant's current fitness may certainly be given weight during the best interests analysis. *Post* at 297 n 13. Yet she would make the initial admission of unfitness dispositive of which presumption controls when an established custodial environment has been established and "when a parent's lack of fitness continues over time . . . ." *Post* at 298 n 13. This case is an apt illustration of how such an analysis begs the question. Is the establishment of the established custodial environment due to the parent's unfitness sufficient in itself? It would appear not, because the parent's lack of fitness must also "continue[] over time." In this case, has defendant's "lack of fitness," diminished as the probate court found it to be, extended over a long enough time? How much time must a parent be unfit, and how unfit must he or she be?

[62] Defendant's remaining arguments claim that the circuit court abused its discretion by finding her to be an unfit parent and in evaluating the best interests factors in MCL 722.23. Given that we are remanding this case for a new best interests hearing, we decline to address these arguments.

hearing in which it must consider all relevant, up-to-date information.[63] At that hearing, the court shall apply MCL 722.25(1) in defendant's favor. The court shall not grant custody to plaintiffs unless plaintiffs demonstrate by clear and convincing evidence that custody with defendant does not serve the children's best interests.[64] In order to make this showing, plaintiffs must prove that "all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person."[65]

V. CONCLUSION

We hold that the established custodial environment presumption in MCL 722.27(1)(c) must yield to the parental presumption in MCL 722.25(1). The parental presumption can be rebutted only by clear and convincing evidence that custody with the natural parent is not

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[63] *Fletcher*, 447 Mich at 889.

[64] Under the CCA, the court is not required to award custody to *either* party. Thus, if plaintiffs do not meet the requisite burden of proof in this custody action, the court has the authority to keep the guardianship intact without awarding custody to either party. That is, on remand, the court could do a number of different things, including, but not limited to: (a) "[a]ward the custody of the child[ren] to 1 or more of the parties involved or to others," MCL 722.27(1)(a); (b) maintain the status quo; or (c) "[t]ake any other action considered to be necessary," MCL 722.27(1)(e). As noted earlier in this opinion, defendant mother cannot circumvent the existing guardianship order by initiating a custody action. Rather, the only action she may initiate is to terminate the guardianship under MCL 700.5208.

[65] *Heltzel*, 248 Mich App at 27. In this way, the established custodial environment is still given weight in the court's analysis and ultimate decision. Therefore, we do not believe this holding "minimize[s] the importance that the CCA's terms place on the established custodial environment . . . ." *Post* at 294 n 11.

in the best interests of the child. We also hold that MCL 722.25(1) satisfies constitutional scrutiny under *Troxel*. Due process does not require a threshold determination of parental fitness in custody cases. The Court of Appeals decision in *Mason* v *Simmons* is overruled. We reverse the judgment of the Court of Appeals and remand this case to the circuit court for a new best interests hearing. We do not retain jurisdiction. Finally, defendant's motion to preserve the confidentiality of the psychiatric evaluation report is granted. The report shall be removed from the copies of the plaintiffs' appendix and placed under seal.

CAVANAGH, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with KELLY, C.J.

WEAVER, J. *(concurring in part and dissenting in part)*. I join in the reversal of the Court of Appeals result and in the remand of this case to the trial court for a new best interests hearing for the reasons stated in the following parts of Chief Justice KELLY's majority opinion and Justice CORRIGAN's partially concurring and partially dissenting opinion:

With respect to Chief Justice KELLY's majority opinion, I join in parts I, II, III(B), and III(D).

With respect to Justice CORRIGAN's partially concurring and partially dissenting opinion, I join in part III, with the exception of footnote 12.

CORRIGAN, J. (*concurring in part and dissenting in part*). I concur in parts I, II, III(B), and III(D) of the majority opinion. I agree with the majority's conclusion that "fit" parents benefit from a constitutional presumption that they will "act in the best interests of their children." *Troxel v Granville*, 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (plurality opinion of

O'Connor, J.); see *ante* at 262. I further agree that, when prior court proceedings govern child custody—such as child protective proceedings under the juvenile code, MCL 712A.1 *et seq.*, or, as in this case, guardianship proceedings under part 2 of article V of the Estates and Protected Individuals Code (EPIC), MCL 700.5201 *et seq.*—these proceedings generally have preclusive effect and the prior court has superior jurisdiction. A parent cannot circumvent these proceedings by seeking custody under the Child Custody Act (CCA), MCL 722.21 *et seq*. See *ante* at 276.

I do not agree with the majority that the constitutional presumption in favor of *fit* parents imbues the presumption in MCL 722.25(1) of the CCA—which applies to *all* parents, not just fit ones—with heightened constitutional meaning so that it always prevails over the mandate concerning established custodial environments in MCL 722.27(1)(c). I do agree that constitutional considerations require the presumption in § 5(1) to predominate in the case of a fit parent. However, when a parent's lack of fitness has been previously established or admitted *and* a third party has an established custodial environment with the child, that parent should not benefit from the presumption in § 5(1). Section 7(1)(c) governs instead.

I. PROCEDURAL BACKGROUND

As the majority explains in part, *ante* at 251-256, this case began in 2002 when defendant and her husband—who were drug-addicted, unemployed, and unable to care for their four young children—voluntarily relinquished custody of the children to plaintiffs. Plaintiffs, who are the children's aunt and uncle, had already been caring for the children intermittently. In November

2002, defendant and her husband petitioned the court[1] to appoint plaintiffs as limited guardians for the children, stating: "We are currently in active addiction to crack cocaine and are unable to care for our children until we seek treatment." Accordingly, they voluntarily suspended their parental rights and the court established a limited guardianship with plaintiffs. Plaintiffs thus gained rights and responsibilities akin to those of a parent with regard to the children under MCL 700.5215, which states, in most pertinent part: "A minor's guardian has the powers and responsibilities of a parent who is not deprived of custody of the parent's minor and unemancipated child . . . ." See MCL 700.5206(4).[2]

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[1] The majority observes that all proceedings in this case took place in the Oakland Circuit Court although there were two separate cases: the probate court guardianship case and the circuit court CCA case. It is helpful to note that the Family Division of the Oakland Circuit Court and the Oakland County Probate Court share jurisdiction over selected matters pursuant to a concurrent jurisdiction plan authorized by MCL 600.406. Thus, although probate courts generally have jurisdiction over guardianship proceedings and circuit courts have jurisdiction over CCA proceedings, all the proceedings between the parties in this case effectively took place before the same court. Even absent a concurrent jurisdiction plan, the probate judge assigned to a guardianship matter must be assigned to serve as the circuit court judge in a subsequent CCA case brought by the guardians. MCL 722.26b(5). Here Judge Eugene A. Moore presided over the guardianship proceedings but later disqualified himself in the CCA matter. The CCA proceedings were ultimately presided over by Judge Linda S. Hallmark. Judges Moore and Hallmark are both Oakland County Probate Court judges assigned to the Family Division of the Oakland Circuit Court.

[2] By design, limited guardianships give parents the opportunity to correct whatever conditions led them to give up custody of their children and to regain custody upon proof of compliance with a limited guardianship placement plan. MCL 700.5205(2). A parent has the right to petition to terminate the limited guardianship under MCL 700.5208 and, if the parent has "substantially complied" with the placement plan, the court must terminate the guardianship. MCL 700.5209(1). A limited guardian also may not seek full custody of a child under the CCA if the parent

Defendant could have regained custody of the children by substantially complying with her placement plan, in which she promised to seek drug treatment and provide a drug-free household for the children. Instead, she and her husband continued their drug use and became involved in crime. Although they petitioned to terminate the limited guardianship in May 2003, the court denied their petition and, instead, ordered them to continue drug treatment, verify their employment, and maintain more regular visitation with the children. Nonetheless, they returned to crime. They were arrested. After being released on bail, they stole a car and fled the police.

In June 2003, plaintiffs petitioned the court to appoint them full guardians.[3] Plaintiffs cited their fear for the children's safety and stated that the police advised them to seek a full guardianship and suspension of parental visits. The court-appointed guardian ad litem for the children investigated and confirmed that defendant and her husband were still using drugs, had lost their jobs, were not paying rent, and had fled the police. On June 17, 2003, the court conducted a hearing on plaintiffs' petition. Neither parent appeared and their whereabouts were unknown. The court suspended their visitation rights until further order. On July 16, 2003, the court appointed plaintiffs full guardians of the children.

Defendant and her husband were subsequently rearrested and incarcerated. Defendant apparently skipped bail again after her second release. She was ultimately

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substantially complies with the placement plan. MCL 722.26b(2). Before establishing a limited guardianship, however, the parent must also be informed that, if he fails without good cause to comply with the placement plan, his parental rights may be terminated under the juvenile code. MCL 700.5205(2).

[3] MCL 700.5204(3) empowers a limited guardian to seek appointment as a full guardian as long as the petition is not based merely on the suspension of parental rights incident to the limited guardianship petition.

convicted and imprisoned in August 2004. In July 2005, after her release from prison, defendant sought visitation with her children. By this time she had not seen them in over two years. The court restored her visitation rights in November 2005 and defendant began paying a small amount of child support. After several months of successful visits and regular child support payments, the court ordered expanded, unsupervised parenting time to begin in May 2006, with overnight visits at defendant's home in Indiana to begin in July 2006. By this time, the children had been living with plaintiffs in Michigan for about four years.

In May 2006, apparently prompted by the order increasing defendant's visitation rights, plaintiffs exercised their rights under MCL 722.26b to seek custody under the CCA and to stay the guardianship proceedings. MCL 722.26b(4). Defendant counterclaimed for custody under the CCA. The court employed the now-outdated rubric in *Mason v Simmons*, 267 Mich App 188; 704 NW2d 104 (2005), to declare defendant unfit and award custody to plaintiffs.[4]

II. SUPERIOR JURISDICTION OF PRIOR PROCEEDINGS

First, I agree that the guardianship proceedings here precluded defendant from separately seeking custody under the CCA. *Ante* at 276. Generally, when two courts have concurrent jurisdiction, the first court that acquired jurisdiction retains it until the matter is fully resolved. See *Schell v Schell*, 257 Mich 85, 88; 241 NW 223 (1932).[5] Accordingly, if a parent's fitness or custody

[4] I concur in the majority's conclusion that *Mason* improperly created a preponderance of the evidence standard "out of thin air," *ante* at 272, where the text of the CCA includes no such standard.

[5] The longstanding rule concerning concurrent jurisdiction was aptly described in *Schell* where, as here, the circuit court was called upon to

rights are governed by an ongoing proceeding—such as the guardianship proceeding here or a child protective proceeding under the juvenile code—the parent may not separately invoke the circuit court's jurisdiction by filing a simultaneous custody action under the CCA.

Because this holding is a crucial element of the majority opinion, I offer an example to illustrate the importance of this jurisdictional rule. Child protective proceedings under the juvenile code are designed to protect children from abuse and neglect—often by temporarily removing them from their parents' custody under emergency conditions—while aiding parents to rectify unfit conditions and regain custody of their children. The purposes of these proceedings would be nullified if a parent could avoid them by regaining custody in a separate proceeding under the CCA.

The juvenile code protects children who, among other things, are subjected to abuse, neglect, or unfit living conditions. MCL 712A.2(b).[6] The code empowers

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decide a custody issue. Significantly, in *Schell*, prior probate court proceedings concerning the child appear to have been abandoned and effectively closed. Accordingly, this Court held:

> As stated by Mr. Justice COOLEY in [*Maclean*] v. *Wayne Circuit Judge*, 52 Mich. 257 [259; 18 NW 396 (1884)]:
>
> "It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action."
>
> *The circuit court and the probate court, juvenile division, had concurrent jurisdiction. The former court having acquired it first, retained it*. [*Schell*, 257 Mich at 88 (emphasis added).]

[6] The most relevant provisions of MCL 712A.2(b) confer court jurisdiction over a child:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects

the Department of Human Services (DHS) to petition for temporary removal of a child from his parent's home for these reasons. The court may authorize the petition "upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of section 2(b) . . . ." MCL 712A.13a(2). If the court orders the child's removal from the parent's custody and orders the child into court or state custody, a process begins during which the DHS works with the parent, if possible, to restore custody with the parent.[7] As I will explain further, this process is statutorily designed to take up to one year. See MCL 712A.19a(1). Within 30 days of the child's removal, and every 90 days thereafter, the DHS must provide service plans detailing its efforts and the services provided to prevent removal or to rectify the conditions that caused removal, as well as the efforts to be made and services to be offered to facilitate the child's return to his parent, if appropriate. MCL 712A.18f. The court generally reviews the case within 182 days of the child's removal and every 91 days thereafter. MCL 712A.19(3). At each

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> or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> (2) [Or w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

[7] Various protections address the parent's due process rights throughout the proceedings, including rights to notice, to participate in all proceedings, see MCL 712A.19(5)(c), MCL 712A.19a(4)(c), and MCL 712A.19b(2)(c), and to an attorney at each stage of the proceedings, MCL 712A.17c(4) and (5).

review hearing, the court must evaluate the parent's compliance with the service plan, MCL 712A.19(6) and (7), and may order additional services or actions, MCL 712A.19(7)(a).

If a child remains outside his home, the court must conduct a permanency planning hearing within one year of the child's removal. MCL 712A.19a(1). At that hearing, if the court determines that the "return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned to his or her parent." MCL 712A.19a(5). If the court determines that the parent poses a substantial risk to the child, it may order the DHS to initiate proceedings to terminate parental rights. MCL 712A.19a(6). If termination is not in the child's best interests, the court may also consider alternative placement plans, including a guardianship. MCL 712A.19a(7). Crucially, the burden of proof is elevated to clear and convincing evidence only at this final stage, the termination of parental rights proceeding. MCL 712A.19b(3).

Because of the different evidentiary standards in the CCA and the juvenile code, a parent could subvert child protective proceedings if the *Schell* rule did not mandate superior jurisdiction in the child protective proceedings. This is because, as noted, the requisite conditions for removal of a child from his parent's custody under MCL 712A.2(b) of the juvenile code must be proved by "a showing of probable cause," MCL 712A.13a(2). But, particularly under the majority's interpretation of the CCA, the DHS or a third party custodian can prevent a parent from regaining custody under the CCA only by rebutting the parental presumption *by clear and convincing evidence*. MCL 722.25(1).

Because the CCA creates a higher burden for a third party seeking custody, the parent could regain custody under the CCA; while the initial conditions warranting emergency removal may have been supported by *probable cause*, the DHS may not yet have gathered enough evidence to meet the heightened *clear and convincing* evidence standard of the statutory presumption in MCL 722.25(1), as would be necessary to prevent the parent from immediately regaining custody. Thus, if the parent could seek custody under the CCA, the Legislature's carefully crafted child protective process—which both protects children *and* ultimately benefits willing parents—could be nullified.

A related problem involving guardianships would arise if a parent could invoke the court's jurisdiction under the CCA although the parent's rights were eligible for termination under the juvenile code. Indeed, although the court may conclude that a child should not be returned to his parent because the parent poses an ongoing substantial risk of harm, the court may place the child with a permanent guardian in lieu of terminating the parent's rights. MCL 712A.19a(6) and (7)(c). That guardianship may continue until the child is emancipated, MCL 712A.19a(7)(c), and the guardian gains all the traditional parent-like rights and duties inherent in a guardianship established under EPIC, MCL 712A.19a(8). If the natural parent could nonetheless obtain custody under the CCA, the purposes and terms of these pre-termination guardianships would be obviated. Particularly under the majority's rule, the parent could file under the CCA to shift the burden to the guardian, thereby requiring the guardian to prove by clear and convincing evidence that placement with the parent is not in the child's best interests. The court's determination during the child protective proceedings that the parent posed a significant harm to his

child would become irrelevant and the guardian would be forced to litigate in defense of his appointment. In addition to subverting the statutory scheme in favor of pre-termination guardianships, this result likely would cause voluntary guardians to decide against accepting guardianship appointments.[8]

In sum, important, practical reasons undergird the *Schell* rule and the principles of collateral estoppel addressed by the majority. Once a court attains jurisdiction of a child's custody under the juvenile code or EPIC, as the first court to attain jurisdiction over these matters, it retains jurisdiction until the proceeding is closed. *Schell*, 257 Mich at 88. A parent cannot simply file separately for custody under the CCA and regain custody by invoking the parental presumption. Permitting a parent to do so would undermine the very purposes of the other statutory schemes addressing custody and child welfare, not to mention the havoc and confusion in courts attempting to properly protect children and adjudicate parental rights under the correct statutes.

Finally, the CCA itself confirms this result by providing a single, explicit exception to the normal application of the *Schell* rule. MCL 722.26b, which grants a guardian standing to seek custody under the CCA, provides the only apparent context in which a CCA action may override decisions of another court with ongoing jurisdiction over the parties' rights to the children.[9] MCL

[8] Indeed, EPIC's guardianship schemes could be effectively nullified, generally, if a parent could avoid ongoing guardianship proceedings by simply filing for custody under the CCA.

[9] To be clear, although the CCA generally cannot be used to override other proceedings, the CCA is often properly employed *incident to* other proceedings when appropriate. For example, custody actions may "arise[] incidentally from another action in the circuit court or an order or judgment of the circuit court," MCL 722.27(1), including a divorce action.

722.26b(4) explicitly states that, when a guardian seeks custody, "guardianship proceedings concerning that child in the probate court are stayed until disposition of the child custody action" and permits an ensuing circuit court order to supersede probate court orders concerning the guardianship of the child. The CCA does not, in turn, permit a parent with the limited rights inherent in guardianship proceedings to sue for custody or stay the guardianship proceedings. Rather, as the majority notes, a parent's recourse would lie in his explicit right to petition the probate court to terminate the guardianship under MCL 700.5208.

III. SECTIONS 5(1) AND 7(1)(c) OF THE CHILD CUSTODY ACT

Although I agree with the majority on the point just discussed, I disagree with the majority's resolution of the apparent conflict between MCL 722.25(1) and MCL 722.27(1)(c) as it applies here, where the guardians invoked MCL 722.26b. I certainly agree with the majority, *ante* at 257, that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). And thus, to satisfy constitutional due process standards, the state "must provide the parents with fundamentally fair procedures." *Id*. at 754; see also *ante* at 257. But, when a parent's unfitness has been established, as it was here, fundamentally fair procedures do not require the court to give that parent the full benefit of the parental presumption. Rather, a parent's rights to a child are limited when he has failed in his duties to that child. In the majority's own words, neither *Troxel* nor the majority opinion "grant[s] *unfit* parents consti-

tutional rights to their children other than due process rights." *Ante* at 276 (emphasis added).

Thus, the presumption that a parent will act in his child's best interests is a *conditional presumption* that applies *only* "so long as a parent adequately cares for" his child. *Troxel*, 530 US at 68 (opinion by O'Connor, J.). Indeed, the parental right derives from a parent's " 'high duty' " to care for his children. *Id.* (citation omitted).[10] Accordingly, when a parent fails to care adequately for his child—and particularly when third parties carry out

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[10] In accord, historically this Court has recognized that parental rights do not derive from mere biology or exist independently from parental duties. As we explained in *In re Gould*, 174 Mich 663, 669-670; 140 NW 1013 (1913):

> The law recognizes the rights of the father *because it recognizes the natural duties and obligations of the father*. The father's right to and authority over his child are secure and inviolable *so long as he properly discharges the correlative duties*.
>
> But the absolute power of the father over his infant children, to treat them as property and dispose of them as he sees fit because they are his, which was once recognized under the Roman law of *patria potestas* and in the codes of early nations, no longer obtains. Paternal authority is subordinate to the supreme power of the State. *Every child born in the United States has, from the time it comes into existence, a birthright of citizenship which vests it with rights and privileges, entitling it to governmental protection—*
>
> "And such government is obligated by its duty of protection, to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority." *Mercein v. People*, 25 Wend. (N. Y.) 64 (35 Am. Dec. 653).
>
> *The power of parental control, though recognized as a natural right and protected when properly exercised, is by no means an inalienable one*. When the "right of custody" is involved between respective claimants for a child, the courts, though in the first instance recognizing *prima facie* rights of relationship, in the final test are not strictly bound by demands founded upon purely technical claims or naked legal rights, but may and should, in making the award, be governed by the paramount consideration of what is really demanded by the best interests of the child. [Emphasis added.]

the parent's high duty in his stead—the automatic presumption in favor of the parent no longer strictly applies. Therefore, although fit parents benefit from a constitutional presumption that they will "act in the best interests of their children," *Troxel*, 530 US at 68; *ante* at 262, the constitutional presumption in favor of *fit* parents does not imbue the presumption in § 5(1) of the CCA with heightened constitutional meaning so that it always prevails over the mandate concerning established custodial environments in § 7(1)(c) without regard to a parent's fitness.

MCL 722.25(1) states that if a child custody dispute "is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." But the powers of the circuit court in any action under the CCA are also governed by MCL 722.27, which circumscribes the orders a court may enter regarding a complaint for custody. MCL 722.27(1) states, in pertinent part:

Thus *Gould* emphasized that a child's rights to be protected from abuse and neglect inform and limit a parent's rights. As we reiterated 50 years later in *Herbstman v Shiftan*, 363 Mich 64, 67-68; 108 NW2d 869 (1961):

> *A child also has rights*, which include the right to proper and necessary support; education as required by law; medical, surgical and other care necessary for his health, morals, or well-being; the right to proper custody by his parents, guardian, or other custodian; and the right to live in a suitable place free from neglect, cruelty, drunkenness, criminality, or depravity on the part of his parents, guardian, or other custodian. It is only when these rights of the child are violated by the parents themselves that the child becomes subject to judicial control. *A parent having violated the rights of a child forfeits his right to the custody, control and upbringing of that child; and when the safety and best interests of the child demand it, the rights of the child must be protected by the court*. [Emphasis added.]

> If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. . . .
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. . . .
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . . The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.
>
> (d) Utilize a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes.
>
> (e) Take any other action considered to be necessary in a particular child custody dispute.

MCL 722.27(1)(c) clearly mandates that the court "*shall not* modify or amend its previous judgments or orders or issue a new order so as to *change the established custodial environment of a child unless there is*

presented clear and convincing evidence that it is in the best interest of the child."[11] (Emphasis added.) Thus, § (7)(1)(c) expressly *deprives the court of the power* to change the established custodial environment absent the requisite showing by clear and convincing evidence that such a change is in the child's best interest.[12] Yet the majority directs circuit courts to ignore this man-

[11] The majority opines that "no constitutional protections for third persons underlie the established custodial environment presumption in MCL 722.27(1)(c)." *Ante* at 263. This may be so. But we should not minimize the importance that the CCA's terms place on the established custodial environment, which serves a *child's* needs. Indeed, an "established custodial environment" is defined in terms similar to those used to describe a child's "rights and privileges entitling it to governmental protection," which obligate the government "to consult the welfare, comfort, and interests of such child in regulating its custody during the period of its minority." *Gould*, 174 Mich at 670 (quotation marks and citation omitted). An established custodial environment exists under § 7(1)(c) "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." Compare the rights of a child listed by *Herbstman*, 363 Mich at 67: "proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being; the right to proper custody by his parents, guardian, or other custodian . . . ."

[12] My conclusions here stem from my willingness to agree, for purposes of this analysis, with the majority's assumption that MCL 722.25(1) and MCL 722.27(1)(c) "irreconcilably conflict" when a parent seeks custody from a third party with an established custodial environment, *ante* at 273; both provisions appear to mandate action from the court, stating respectively that "the court *shall* presume that the best interests of the child are served by awarding custody to the parent," § 5(1), and that "[t]he court *shall not* . . . change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child," § 7(1)(c). (Emphasis added.) Yet because § 7 broadly circumscribes the circuit court's power in *all* cases under the CCA, I would be more inclined to hold that the prohibition on changing an established custodial environment in § 7(1)(c) clearly controls, as a textual matter, whenever the terms of both § 5(1) and § 7(1)(c) apply in a given case. I do not agree with the majority that, through § 5(1), the Legislature clearly intended to "offer[] *greater* protection [than is required by the constitution] to the fundamental parenting rights of

date in *all* cases where *any* natural parent—except one whose parental rights were previously terminated or suspended, *ante* at 277—seeks custody from a third party with an established custodial environment.

But in light of the strong mandate expressed in § 7(1)(c), and because the constitutional parental presumption applies only to *fit* parents, I would hold that the presumption in § 5(1) prevails over the mandate in § 7(1)(c) by necessity *only* when a *fit* parent seeks custody from a third person with an established custodial environment. Where an unfit parent is concerned, no statutory or constitutional reason exists to simply ignore § 7(1)(c) if a third person has an established custodial environment.

Further, because the constitutional parental presumption applies *only* to *fit* parents, a parent's fitness remains relevant. I acknowledge that the CCA does not refer to fitness. See *ante* at 273. But this bare observation does not adequately consider the various proceedings at which a parent's fitness may be questioned—indeed, it does not consider the very proceedings that likely led to a custodial environment being established with a third party custodian in the first place.

Troxel equated a fit parent with one who "adequately cares for his or her children." *Troxel*, 530 US at 68 (opinion by O'Connor, J.). It illustrated the presumption in favor of fit parents as "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 68 (quotation marks and citation omit-

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natural parents, regardless of whether the natural parents are fit." *Ante* at 274. Nevertheless, my observations concerning the textual dominance of 7(1)(c) are largely inapposite to my overall conclusion; I am persuaded that, if a *fit* parent's custody interests are opposed to those of a third party with an established custodial environment, the parent should benefit from a parental presumption as a matter of *constitutional* right.

ted). Various proceedings call upon courts to make findings, or call upon parents to make admissions, *counter* to these presumptions in order to fulfill the state's duties to protect its children. The child protective proceedings described above and guardianship proceedings like this case are good examples of proceedings that, by their nature, may establish a parent's unfitness. Principles of collateral estoppel generally prevent a party from relitigating an issue already established in a prior proceeding. See *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). Indeed, as the majority observes, this Court has "long recognized" the applicability of collateral estoppel, including to "probate courts orders such as the guardianship orders in this case." *Ante* at 276, citing *Chapin v Chapin*, 229 Mich 515; 201 NW 530 (1924). Such orders "are *res judicata* of the matters involved and cannot be attacked collaterally." *In re Ives*, 314 Mich 690, 696; 23 NW2d 131 (1946). Further, permitting a parent to avoid past findings or admissions of unfitness *and nonetheless gain a constitutional advantage despite unfitness* clearly runs the risk of endangering the child and compromising state laws aimed at upholding the state's duties to its child citizens. Most significant to our purposes, if a parent's lack of fitness has been established, there is no longer a constitutional reason to ignore the mandate in MCL 722.27(1)(c) in favor of MCL 722.25(1). Accordingly, I conclude that in cases where a parent's lack of fitness was either determined or admitted in a prior proceeding, the parent cannot later claim fitness and benefit from the presumption in § 5(1) in a proceeding under the CCA.[13]

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[13] The majority states that my approach is contrary to *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994), which required the trial court on remand to consider "up-to-date information" and "(any other changes in circumstances)" when awarding custody. See *ante* at 277

n 61. I have no objection to the *Fletcher* Court's requirement, which applied to the trial court's consideration of the best interests factors in MCL 722.23. But I disagree with the majority's assertion that *Fletcher* precludes a trial court from taking into account a past finding of unfitness when determining whether the presumption in MCL 722.25(1) must prevail over the mandate in MCL 722.27(1)(c) as a constitutional matter. *Fletcher* addressed *only* the best interests determination on remand in light of the fact that circumstances may change during the appellate process. See *Fletcher*, 447 Mich at 888-889. Indeed, it expressly prohibited reconsideration of the threshold question whether any party had an established custodial environment for purposes of applying § 7(1)(c). *Id.* at 889 n 10 ("We do not suggest that the events which have taken place during the appellate process give rise to an 'established custodial environment' that . . . alters the burden of proof in favor of the party who has enjoyed custody during the appeal."). In no way did *Fletcher* suggest that the threshold issue of a parent's past, admitted unfitness should be reconsidered over time in order to alter the burden of proof.

The majority further states that I would "make the initial admission of unfitness dispositive" although defendant "was fulfilling increasing duties to her children and gaining increased visitation time." *Ante* at 278 n 61. First, I would note that—just as the majority asserts that the established custodial environment may be given weight when the court considers the best interests factors, *ante* at 279 n 65—defendant's current, apparently increasing ability to care for her children should certainly be given weight during this process. Second, to the extent that the majority suggests that a past admission of unfitness should not be dispositive because defendant's lack of fitness here diminished and should be reconsidered over time, I note that defendant admitted her unfitness in 2002, had no contact with her children at all for approximately two years during 2003-2005, was released from prison in July 2005, and had been back in contact with her children for only about six months when plaintiffs filed their complaint for custody in May 2006. By this time, the children had been living with plaintiffs in Michigan for about four years. Accordingly, I emphasize my conclusion that a past admission of unfitness is not dispositive *in itself.* Rather, by its terms the mandate in § 7(1)(c)—which circumscribes the court's power to "[m]odify or amend its previous judgments or orders" and specifically to "modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment"—controls *only* when a prior admission of unfitness led to additional circumstances and court orders creating an established custodial environment with a third party. Indeed, by definition, the prohibition on changing the established custo-

Here, defendant and her husband admitted unfitness in 2002 when they sought the limited guardianship because they were jobless, addicted to crack, and unable to care for their children. They could have regained custody of the children by substantially complying with their placement plan. Instead, they relapsed, continued their involvement with crime, and failed to appear at the hearing on plaintiffs' petition to establish a full guardianship.[14] Under these circumstances, defendant's unfitness was clearly established at prior proceedings. Indeed, defendant admitted her unfitness and willfully forwent her statutorily granted right to regain custody despite the admission. Defendant further could have challenged the results of the guardianship proceedings by appealing, but she did not do so. The court should not now be directed to sweep such findings and admissions under the rug by applying a constitutional presumption in favor of *fit* parents in an action involving the very people who cared for defendant's children in the face of her parenting failures. For these reasons I conclude that when, as here, a third party establishes a custodial environment after proof of a parent's unfitness, the procedure for changing an established custodial environment mandated by MCL 722.27(1)(c) controls.

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dial environment in § 7(1)(c) applies only when a parent's lack of fitness continues over time so that third parties take on the parental role and establish a custodial environment—such an environment is established only if "*over an appreciable time* the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c) (emphasis added).

[14] Plaintiffs aptly observe that defendant's lack of fitness was the direct cause of their appointment as guardians—a status that bestows rights akin to parental rights. MCL 700.5215. They further note that defendant's absence from her children's lives thus created the very established custodial environment with plaintiffs that defendant now seeks to delegitimize by applying the constitutional presumption in favor of *fit* parents.

IV. CONCLUSION

In conclusion, I agree with the majority that a *fit* parent who properly seeks custody under the CCA benefits from the parental presumption in MCL 722.25(1). But, contrary to the majority, I would conclude that, where a parent's lack of fitness is established, MCL 722.27(1)(c) controls if a third party has an established custodial environment for the children.

Further, if parental or custody rights are governed by other proceedings, a parent is precluded from using the CCA as an end run around such proceedings; rather, the first court to gain jurisdiction over these matters retains jurisdiction. The CCA provides a single exception to this rule in MCL 722.26b, which plaintiffs properly invoked in this case and which permits guardians to seek custody although guardianship proceedings are ongoing. But, finally, I agree with the majority that even when a custody action is properly filed under § 6b, as here, the circuit court is not bound to award custody to any party. Instead, it has broad discretion to act "for the best interests of the child . . . ." MCL 722.27(1). Accordingly, the court in its discretion may dismiss plaintiffs' custody action in light of plaintiffs' apparent attempt to subvert the ongoing guardianship proceedings in which defendant was fulfilling increasing duties to her children and gaining increased visitation time.

PETERSEN v MAGNA CORPORATION

Docket Nos. 136542 and 136543. Argued January 22, 2009 (Calendar No. 7). Decided July 31, 2009.

Rick Petersen sought workers' compensation benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., for an injury he suffered while working for codefendant Koleasco, a trucking company that had hired codefendant BCN Transportation Services to administer its employee benefits. The magistrate ruled that both BCN and Koleasco were liable for the plaintiff's workers' compensation benefits and that plaintiff's counsel was entitled to an attorney fee of 30 percent of the plaintiff's unpaid medical bills under MCL 418.315(1). The Workers' Compensation Appellate Commission (WCAC) affirmed both rulings. The Court of Appeals initially denied leave to appeal, but the Supreme Court remanded for consideration as on leave granted on the issues of the division of defendants' liabilities and the assessment of attorney fees. 477 Mich 871 (2006). On remand, the Court of Appeals, WHITBECK, C.J. (WHITE, J., concurring, and ZAHRA, J., concurring in part and dissenting in part), affirmed the WCAC's assessment of attorney fees against defendants, holding that attorney fees could be imposed on employers and their insurers under MCL 418.315(1). Unpublished opinion per curiam of the Court of Appeals, issued April 17, 2008 (Docket Nos. 273293 and 273294). The Supreme Court granted the defendants' application for leave to appeal. 482 Mich 994 (2008).

In an opinion by Chief Justice KELLY, joined by Justice CAVANAGH, and an opinion by Justice HATHAWAY, joined by Justice WEAVER, the Supreme Court *held*:

The term "prorate" in MCL 418.315(1) applies exclusively to employers and their insurance carriers.

Chief Justice KELLY, joined by Justice CAVANAGH, stated that the Legislature intended that the term "prorate" in the last sentence of MCL 418.315(1) applies only to employers and their insurance carriers. Chief Justice KELLY recommended that the Court modify and expand the principles set forth in *Robinson v Detroit*, 462 Mich 439 (2000), governing when the Court should depart from the principle of stare decisis. A stare decisis analysis should always begin

with a presumption that upholding precedent is the preferred course of action, followed by a determination whether a compelling justification exists to overturn the precedent. A lower level of deference should be afforded to cases that represent a recent departure from the traditional notions of stare decisis. Chief Justice KELLY rejected the test for statutory ambiguity espoused in *Lansing Mayor v Pub Service Comm*, 470 Mich 154 (2004), as unworkable and having no basis in Michigan law. She concluded that the last sentence of MCL 418.315(1) is ambiguous because it is capable of being understood by reasonably well-informed persons in two or more different senses, and consequently fails to clearly indicate the parties among whom attorney fees may be prorated. Chief Justice KELLY also concluded that the American rule of attorney fees does not apply to MCL 418.315(1).

Justice HATHAWAY, joined by Justice WEAVER, concurred in Chief Justice KELLY's lead opinion to the extent that it concluded that the term "prorate" in MCL 418.315(1) applies exclusively to employers and their insurance carriers. Justice HATHAWAY wrote separately to state that MCL 418.315(1), when read as a whole, is not ambiguous.

Affirmed.

Justice CORRIGAN, dissenting, fully joined Justice MARKMAN's dissenting opinion and part II(B) of Justice YOUNG's dissenting opinion.

Justice YOUNG, dissenting, fully joined part IV of Justice MARKMAN's dissenting opinion. Justice YOUNG further dissented from the majority's conclusion that the term "prorate" in MCL 418.315(1) applies only to employers and their insurance carriers and from the conclusion in Chief Justice KELLY's lead opinion that a workers' compensation claimant may never be deemed responsible for a portion of the attorney fees incurred. Justice YOUNG stated that a workers' compensation claimant is ordinarily responsible for bearing the costs of the claimant's portion of the litigation, including attorney fees. MCL 418.315(1) serves as an exception to this general rule, permitting a workers' compensation magistrate to prorate attorney fees, at the contingent fee rate paid by the claimant, between the claimant and the employer when the employer refuses to pay reasonable and needed medical expenses for an injury arising out of and in the course of employment. When, as in this case, there are legitimate legal and factual disputes to be resolved with respect to disputed workers' compensation claims, the disputes must be resolved at a hearing before the magistrate, who must determine whether medical treatment was needed, reasonable, and related to a personal injury arising out of

and in the course of employment. While employers should be discouraged from wrongly denying medical benefits, there is no basis for assessing attorney fees against an employer for correctly denying claims to which a claimant is not entitled, or from seeking a resolution of arguable legal or factual disputes that call into question the employer's obligation to pay. This case should be remanded to the magistrate for an assessment of the issue of attorney fees under the correct standard.

Justice MARKMAN, joined by Justice CORRIGAN, dissenting, would reverse the Court of Appeals and hold that MCL 418.315(1) does not allow a magistrate to assess an employee's attorney fees against the employer. Rather, MCL 418.315(1) only allows a magistrate to divide an employee's attorney fees among medical providers, and only when the magistrate has ordered the employer to make direct payment for unpaid medical expenses to those providers. In reaching a contrary conclusion, the Chief Justice adopted an understanding of "ambiguity" that facilitates arbitrary and unpredictable judicial decision-making, in which judges give meaning to the law with little regard for the actual words of the Legislature, in place of traditional judicial decision-making in which such words are paramount.

WORKERS' COMPENSATION — WORKER'S DISABILITY COMPENSATION ACT — ATTORNEY FEES — PRORATION OF ATTORNEY FEES.

The term "prorate," as used in the statutory provision that gives workers' compensation magistrates the authority to prorate attorney fees, applies exclusively to employers and their insurance carriers (MCL 418.315[1]).

Evans & Portenga (by *John A. Braden*) for Rick H. Petersen.

Robert W. Macy (*Daryl Royal*, of counsel) for Magna Corporation and Midwest Employers Casualty Company.

Mark A. Kidder for BCN Transportation Services, Inc., and TIG Insurance Company.

Amici Curiae:

Martin L. Critchell for the Michigan Workers' Compensation Placement Facility.

Steven C. Hess, *Richard F. Zapala*, and *Michael T. Reinholm* for Accident Fund Insurance Company of America.

Lacey & Jones (by *Gerald M. Marcinkoski*) for the Michigan Self-Insurers' Association.

Kerr, Russell and Weber, PLC (by *Patrick J. Haddad*, *Daniel J. Schulte*, and *Jonathan S. Berg*), for the Michigan State Medical Society.

Kluczynski, Girtz & Vogelzang (by *Duncan A. McMillan*) for St. Paul Fire & Marine Insurance Company.

Dickinson Wright PLLC (by *Joseph A. Fink* and *Robert W. Powell*) for Blue Cross and Blue Shield of Michigan.

Donald M. Fulkerson for the Michigan Association for Justice.

Miller Johnson (by *Stephen R. Ryan* and *Marcus W. Campbell*) for the Michigan Health and Hospital Association.

Martin L. Critchell for the American Insurance Association.

KELLY, C.J. We granted leave to appeal in this case to determine the parties against whom attorney fees may be prorated under MCL 418.315(1). We conclude that the term "prorate" in MCL 418.315(1) applies only to employers and their insurance carriers. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case involves a dispute over workers' compensation benefits. Plaintiff Rick Petersen began working

for codefendant Koleasco, a trucking company, in February 1997. In March 1997, Koleasco hired codefendant BCN Transportation Services (BCN), a human resources "employee leasing" company, to administer its employee benefits.

In November 1997, plaintiff was injured when he fell from a flatbed truck while securing a load of Christmas trees. After the accident, he underwent surgery on his right foot and applied for workers' compensation benefits. The following year, he required treatment for back pain, which his treating physician believed was caused by the November 1977 fall.

Several questions were taken to a workers' compensation magistrate: (1) who was plaintiff's employer at the time of his injury, BCN or Koleaseco? (2) was Midwest Employers Casualty Company the relevant insurer for workers' compensation purposes? (3) was plaintiff disabled? and (4) if so, which injury caused his disability? The magistrate bifurcated these issues into two trials.

In the first trial, the magistrate ruled that plaintiff was a Koleaseco employee on the date of his injury despite the fact that BCN paid his wages. Thus, because BCN had stipulated that it was plaintiff's employer, the magistrate ruled that both BCN and Koleaseco were plaintiff's employers and both were liable for plaintiff's workers' compensation benefits. On appeal, the Workers' Compensation Appellate Commission (WCAC) affirmed that ruling.

In the second trial, the magistrate considered (1) was plaintiff's counsel entitled to an attorney fee of 30 percent of plaintiff's medical bills unpaid by defendant? and (2) who was responsible for paying plaintiff's future medical and weekly benefits? With respect to plaintiff's attorney fees, the magistrate ruled:

> [A]lthough Midwest . . . was paying the plaintiff weekly benefits, it refused to pay medical bills related to [plaintiff's] injury . . . . The total amount of the medical bills incurred . . . which defendant refused to pay is $153,448.54. I find that plaintiff's counsel is entitled to a 30 percent attorney fee for these unpaid medical bills under Section 315(1).

With respect to whether BCN or Koleaseco was responsible for paying plaintiff's ongoing medical and weekly benefits, the magistrate ruled that BCN and its insurance carrier, Midwest, were primarily responsible.

Again, both parties appealed to the WCAC, which affirmed the award of attorney fees, observing:

> While the magistrate failed to explicitly so find, in this case . . . defendant knew of the medical bills in question well in advance of trial, and simply refused to pay them claiming they were not work related. Once the magistrate so found, given that prior knowledge and refusal to pay, the action in awarding attorney fees was within his discretion and hence proper.

Magna Corporation, another "employee leasing" company insured by Midwest, and Midwest sought leave to appeal both WCAC orders. The Court of Appeals initially denied the applications.[1] We remanded the case for consideration as on leave granted.[2]

On remand, the Court of Appeals affirmed the WCAC.[3] The Court found that competent evidence supported the factual findings of both the magistrate

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[1] *Petersen v Magna Corp*, unpublished order of the Court of Appeals, entered April 11, 2006 (Docket No. 266037); *Petersen v Magna Corp*, unpublished order of the Court of Appeals, entered April 11, 2006 (Docket No. 266177).

[2] *Petersen v Magna Corp No 1*, 477 Mich 871 (2006); *Petersen v Magna Corp No 2*, 477 Mich 871 (2006).

[3] *Petersen v Magna Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2008 (Docket Nos. 273293 and 273294), at 8.

and the WCAC with respect to plaintiff's employment. Regarding the assessment of attorney fees, the Court held that § 315(1) is ambiguous because it does not identify the entity against which the magistrate may assess such fees.[4]

The Court concluded, "[W]here the remainder of [§ 315(1)] discusses the employer and/or the [insurance] carrier, it follows that the attorney fees are to be calculated or divided between those entities. The plain language of the statute does not mandate that the health care provider assume responsibility for any portion of those fees."[5] We granted leave to appeal to consider the proper interpretation of § 315(1).[6]

II. MCL 418.315(1)

The proper interpretation and application of a statute presents a question of law that we review de novo.[7] MCL 418.315(1), part of the Worker's Disability Compensation Act (WDCA),[8] provides in pertinent part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The *employer or the employer's carrier* may file a petition objecting to the named physician selected

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[4] *Id*. at 9.

[5] *Id*. at 10.

[6] *Petersen v Magna Corp*, 482 Mich 994 (2008).

[7] *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

[8] MCL 418.101 *et seq*.

> by the employee and setting forth reasons for the objection. If *the employer or carrier* can show cause why the employee should not continue treatment with the named physician of the employee's choice, . . . the . . . magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician . . . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the workers' compensation magistrate. *The workers' compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee*. [Emphasis added.]

A. STATUTORY INTERPRETATION

This is a case of statutory interpretation. The primary goal of such interpretation is to give effect to the intent of the Legislature.[9] The first step in ascertaining such intent is to focus on the language of the statute itself. If statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute.[10] The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in a statute.[11] If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.[12]

However, when statutory language is ambiguous, this Court has consistently held that a court construing it

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[9] *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007).

[10] *Id*.

[11] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (quotation marks and citations omitted).

[12] *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

may go beyond the plain language of the statute.[13] In fact, where the language leaves the statute's meaning ambiguous, it is the duty of the courts to construe it, giving it an interpretation that is reasonable and sensible.[14] Therefore, a finding of ambiguity has important interpretive ramifications.

In this case, the Court of Appeals held that the last sentence of § 315(1) is ambiguous in that it is unclear who is responsible for an injured employee's attorney fees. Thus, the threshold question is whether, in light of the plain language of the entire provision, the last sentence of § 315(1) is ambiguous.

Section 315(1) gives magistrates the discretionary authority to prorate attorney fees at the contingent fee rate paid by the employee. "Prorate" means "to divide, distribute, or calculate proportionately."[15] In § 315(1), the term "prorate" could reasonably apply to employers, their insurance carriers, health care providers, employees seeking workers' compensation benefits, or to any combination of them. Moreover, neither § 315 as a whole nor any other provision of the WDCA indicates the parties to whom a division or distribution of attorney fees applies.

I agree with the Court of Appeals conclusion that the final sentence of § 315(1) applies only to employers and their insurance carriers. This is because that interpretation harmonizes the final sentence with the remainder of § 315(1). The final sentence does not stand alone.[16] It

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[13] *Sun Valley*, *supra* at 236, citing *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

[14] *Crary v Marquette Circuit Judge*, 197 Mich 452, 454; 163 NW 905 (1917).

[15] *Random House Webster's College Dictionary* (2001).

[16] Under the doctrine of *noscitur a sociis*, the meaning of an unclear word or phrase should be determined by the words immediately sur-

must be construed in the context of § 315(1) in its entirety and harmonized with the statute's other provisions to satisfy the purpose intended by the Legislature.[17]

Here is how that construction operates. Section 315(1) concerns employer liability to pay medical benefits to workers injured in the course of employment. The statute as a whole provides a process for employers and their insurance carriers to object to the medical treatment that an injured employee seeks. Hence, "prorate" in the final sentence of § 315(1), when read with the remainder of the statute, applies to the parties who might contest the payment of medical benefits: employers and their insurance carriers.[18] This interpretation unifies the last sentence of § 315(1) with the remainder of the statute.

I now consider the Legislature's use of the word "may" with respect to prorating attorney fees. The word "may" is permissive in nature. As applied to "prorate," "may" indicates that magistrates have discretion in determining whether to award attorney fees. Hence, magistrates are allowed to award attorney fees, but they are not required to do so.[19]

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rounding it. *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008).

[17] *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993).

[18] Justice MARKMAN would hold medical providers responsible for a proration of attorney fees. In support of this claim, he cites MCL 418.827, which provides a basis for nonparty employers to recover through the efforts of an employee's attorney pursuing a third-party liability action. Had the Legislature intended a scheme in § 315 similar to that provided in § 827, it could have used similar or identical language. However, it did not do so.

[19] The Legislature often vests discretion in magistrates by using the word "may." Other provisions of the WDCA that vest discretion in magistrates by using the word "may" include MCL 418.321, MCL 418.335, MCL 418.345, and MCL 418.835.

Likewise, the word "may" bears on whether a proration must occur if a magistrate does award attorney fees. I would hold that the use of the word "may" grants magistrates the discretion to prorate attorney fees among employers and their insurance carriers. Should a magistrate determine that only one of those parties is liable, the magistrate may impose attorney fees against only that party. Conversely, should the magistrate find multiple parties liable, fees may be prorated accordingly. This interpretation affords the phrase "may prorate" its full meaning.[20]

Nonetheless, as evidenced by the dissents in this case, competing reasonable interpretations of § 315(1) exist when its language alone is considered.[21] In fact, the words of § 315(1), in light of the entire statute and the WDCA, do not clearly indicate the parties to whom a proration of attorney fees applies. As a consequence, I am unable to ascertain the intent of the Legislature based solely on the language of the statute. I turn next to the question whether § 315(1) is ambiguous.

1. *LANSING MAYOR v PUB SERVICE COMM*

This Court's most recent pronouncement on the

[20] Contrary to Justice MARKMAN's contention, this interpretation does not "read[] an authorization into the statute . . . ." *Post* at 356. Nothing in the definition of "prorate" indicates that one party cannot be apportioned zero liability. A "division" or "distribution" does not require that both parties subject to that division receive an assessment of liability. For example, liability could be allocated on a 50-50, 75-25, or 100-0 basis, depending on the magistrate's allocation of fault and the number of parties involved.

[21] Justice MARKMAN claims that I "withdraw[] from the process of statutory interpretation once other interpretations are presented." *Post* at 365. This is incorrect. Section 315(1) refers to multiple parties and lacks an indication of which of them is subject to a proration of attorney fees. No other provision in the WDCA resolves the question. From that I conclude that the statute is capable of being understood by reasonably well-informed persons in two or more different senses. See *infra* at 331.

proper standard for discerning whether statutory language is ambiguous was espoused in *Lansing Mayor v Pub Service Comm*.[22] In that case, the Court examined MCL 247.183 to determine whether it required a company to obtain local government consent before beginning pipeline construction. Critical to the Court's analysis was its discussion of the proper method for discerning statutory ambiguity.

The Court stated that statutory provisions are not ambiguous unless one "irreconcilably conflicts" with another or unless a term is "equally susceptible to more than a single meaning."[23] Applying this definition, the *Lansing Mayor* majority observed that "[o]nly a few provisions are truly ambiguous."[24]

Lansing Mayor's definition of "ambiguity" is unsupported by any Michigan law whatsoever, having been derived, as it were, from thin air.[25] *Rusinek v Schultz, Snyder & Steele Lumber Co* is the only Michigan case predating *Lansing Mayor* that employs the language "equally susceptible."[26] However, *Rusinek* did not state that language is ambiguous only if it is equally susceptible to different interpretations. Instead, *Rusinek* simply held that statutes in derogation of common law must be strictly construed.[27]

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[22] *Lansing Mayor v Pub Serv Comm*, 470 Mich 154; 680 NW2d 840 (2004).

[23] *Id*. at 166. Since having announced this exceedingly narrow definition of "ambiguity," the Court has declined to find any statutory language ambiguous.

[24] *Id*.

[25] See Kelly & Postulka, *The fatal weakness in the Michigan Supreme Court majority's textualist approach to statutory construction*, 10 TM Cooley J Prac & Clinical L 287, 289 (2008).

[26] *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981).

[27] *Id*. at 507-508.

Also unsupported as a threshold for finding ambiguity is the "irreconcilably conflicts with another provision" language found in *Lansing Mayor*. The *Lansing Mayor* majority cited *Klapp v United Ins Group Agency, Inc*[28] for this definition of "ambiguity," but *Klapp* simply states that language is ambiguous when "its provisions are capable of conflicting interpretations."[29] It neither requires an irreconcilable conflict nor that the language be equally susceptible to more than one interpretation. Thus, the two-pronged "equally susceptible" and "irreconcilably conflicts" test adopted in *Lansing Mayor* has no basis in Michigan law.

Furthermore, the *Lansing Mayor* majority made two explicit and glaring misstatements of law. First, it cited *Klapp* for the proposition that a finding of "ambiguity is a finding of last resort."[30] *Klapp* did not say this. Instead, *Klapp* held that the rule of *contra proferentem*[31] is a rule of last resort. Indeed, *Klapp* concluded that the language at issue in that case was ambiguous, without commenting on whether such a conclusion was a "good" or a "bad" thing.[32] Wholly absent from *Klapp*, or other Michigan law, is any indication that consideration of whether language is ambiguous should be given only as a last resort.

Second, I note that the *Lansing Mayor* majority expressly rejected the "reasonable minds" standard for discerning ambiguity as applied by the dissent in that

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[28] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003).

[29] *Id*. at 467.

[30] *Lansing Mayor*, *supra* at 165 n 6, citing *Klapp*, *supra* at 474.

[31] *Contra proferentem* is a rule of contract interpretation stating that ambiguities will be construed against the drafter of a contract. 2 Restatement Contracts, 2d, § 206, p 105.

[32] I reject the *Lansing Mayor* majority's implication that a finding of ambiguity is inherently a "bad" thing, as it is nothing more than an aid to statutory construction. See *Lansing Mayor*, *supra* at 165-166.

case. The majority stated "[t]hat is not, and has never been, the standard either for resolving cases or for ascertaining the existence of an ambiguity in the law."[33] However, the Court cited no authority for this proposition. In fact, this holding was a blatant misstatement of the law.[34]

Because it was based on a mythical definition of "ambiguity" and egregious misstatements of law, I reject *Lansing Mayor*'s standard for discerning statutory ambiguity.[35]

i. STARE DECISIS[36]

Because I conclude that *Lansing Mayor*'s definition

[33] *Id*. at 165-166.

[34] See part II(A)(2) of this opinion.

[35] Unable to cite caselaw in support of its definition of "ambiguity," the *Lansing Mayor* majority invented its own definition. This definition was premised on the majority's implication that a finding of ambiguity is a "bad" thing because it enables judges to use "presumptive 'rules of policy' " or "engage in a largely subjective and perambulatory reading of 'legislative history.' " *Lansing Mayor*, *supra* at 164-165. These approaches were disdained because they supposedly allowed judges to "substitut[e] their own policy preferences for those of the Legislature." *Id*. at 164.

However, the *Lansing Mayor* majority failed to acknowledge that its "plain meaning" approach to statutory interpretation is equally susceptible to subjective and arbitrary determinations of legislative intent. For example, such an approach may lead to the selection of one dictionary definition among many for a specific term. Lacking may be any sound explanation why the chosen definition was the one that the Legislature intended to use. See, e.g., *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 56-57; 746 NW2d 282 (2008) ("We conclude that the second meaning [out of six] is the one the Legislature intended."). Therefore, this approach is erroneous in the same way as is an approach that stretches to find ambiguity where none exists. I agree that it is inappropriate to inject policy considerations into the reading of an unambiguous statute.

[36] I stated in my concurring opinion in *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170; 730 NW2d 722 (2007), that tools of statutory

of "ambiguous" is unsupported by Michigan law, I must now determine whether it ought to remain the controlling method for discerning ambiguity in the laws of this state. I treat the definition as governed by stare decisis for purposes of analysis.

Stare decisis is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm." Stare decisis attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors.[37] This doctrine has been part of the American legal landscape since the country's formation.[38]

Alexander Hamilton wrote that, to "avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before

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interpretation, such as the definition of "ambiguity," are not "binding" in the same sense as is the holding in a case. Therefore, they are not entitled to the same level of deference, and stare decisis does not apply to them. However, *Lansing Mayor* purported to "hold" that its definition of "ambiguity" was the only applicable method for discerning statutory ambiguity. Furthermore, the *Lansing Mayor* majority explicitly stated in *Fluor* that "our current law [regarding ambiguity] is set forth in [*Lansing Mayor*]." *Fluor*, *supra* at 177 n 3. Perhaps for those reasons, this Court, as well as the Court of Appeals, has treated *Lansing Mayor*'s definition of "ambiguity" like any other binding precedent. See, e.g., *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008); *Toll Northville, Ltd v Northville*, 480 Mich 6, 15 n 2; 743 NW2d 902 (2008); *Batko v Batko*, 477 Mich 992 (2007) (MARKMAN, J., dissenting); *Casco Twp v Secretary of State*, 472 Mich 566, 591; 701 NW2d 102 (2008); *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 244; 704 NW2d 117 (2005). Although I disagree with that conclusion, I apply a stare decisis analysis to the *Lansing Mayor* definition of "ambiguity" for purposes of analysis.

[37] Am Jur, Courts, § 131.

[38] The doctrine can be traced back to medieval England. Healy, *Stare decisis as a constitutional requirement*, 104 W Va L R 43, 56-62 (2001).

them . . . ."[39] In the early twentieth century, Justice (then-Judge) Cardozo wrote that the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[40]

Although any rule is only as solid as its boundaries are clear, it was not until recently that this Court formally established a test to determine when it should depart from stare decisis. In 2000, in *Robinson v Detroit*,[41] the Court held that the first question in deciding whether to overrule precedent is whether an earlier decision was wrongly decided.[42] Next, according to *Robinson*, courts should review (1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision.[43] Thus, *Robinson* enunciated a test premised on whether the questioned decision was wrongly decided, to be followed by a three-pronged analysis of whether stare decisis nonetheless counsels upholding it.

Although the *Robinson* test was implemented as a mechanism for determining when a prior decision of the Court should be upheld, its application has proven superficial and cursory.[44] In fact, an examination of

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[39] The Federalist No. 78, p 471 (Alexander Hamilton) (Clinton Rossiter ed, 1961).

[40] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p 149.

[41] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

[42] *Id*. at 464.

[43] *Id*.

[44] See, e.g., *Paige v Sterling Hts*, 476 Mich 495, 513; 720 NW2d 219 (2006) ("[W]e need not consider whether changes in the law and facts no

cases applying the *Robinson* test demonstrates that *not once* has the Court cited it as a basis for upholding a prior decision.[45] *Robinson*'s statement that a wrongly decided case should "invariably" be overruled was a chilling signal that a conclusion that precedent has been wrongly decided is sufficient justification for overruling it.[46]

These facts alone suffice to show that *Robinson* is insufficiently respectful of precedent. Therefore, I

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longer justify [the precedent] because [the precedent] itself was never justified."), *People v Hickman*, 470 Mich 602, 610 n 6; 684 NW2d 267 (2004), and *Mack v Detroit*, 467 Mich 186, 203 n 19; 649 NW2d 47 (2002) (citing *Robinson* only as an afterthought in a footnote).

[45] See, e.g., *Gardner*, *supra* at 61; *People v Ream*, 481 Mich 223, 240; 750 NW2d 536 (2008); *People v Barrett*, 480 Mich 125, 138; 747 NW2d 797 (2008); *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 393; 738 NW2d 664 (2007); *Renny v Dep't of Transportation*, 478 Mich 490, 503; 734 NW2d 518 (2007); *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007); *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 38; 732 NW2d 56 (2007); *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 297; 731 NW2d 29 (2007); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214; 731 NW2d 41 (2007); *Haynes v Neshewat*, 477 Mich 29, 39; 729 NW2d 488 (2007); *Paige*, *supra* at 510; *Grimes v Dep't of Transportation*, 475 Mich 72, 87; 715 NW2d 275 (2006); *People v Hawthorne*, 474 Mich 174, 183; 713 NW2d 724 (2006); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 584; 702 NW2d 539 (2005); *People v Schaefer*, 473 Mich 418, 434; 703 NW2d 774 (2005); *People v Starks*, 473 Mich 227, 236; 701 NW2d 136 (2005); *Garg v Macomb Mental Health*, 472 Mich 263, 285; 696 NW2d 646 (2005); *People v Davis*, 472 Mich 156, 169; 695 NW2d 45 (2005); *Neal v Wilkes*, 470 Mich 661, 667; 685 NW2d 648 (2004); *Hickman*, *supra* at 610; *People v Lively*, 470 Mich 248, 256; 680 NW2d 878 (2004); *People v Moore*, 470 Mich 56, 69; 679 NW2d 41 (2004); *Hayne v Dep't of State Police*, 468 Mich 302, 314; 664 NW2d 129 (2003); *Mack*, *supra* at 203; *Sington v Chrysler Corp*, 467 Mich 144, 161; 648 NW2d 624 (2002); *People v Petit*, 466 Mich 624, 633; 648 NW2d 193 (2002); *People v Cornell*, 466 Mich 335, 358; 646 NW2d 127 (2002); *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 756; 641 NW2d 567 (2002); *Pohutski v City of Allen Park*, 465 Mich 675, 693; 641 NW2d 219 (2002); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 708; 614 NW2d 607 (2000).

[46] *Robinson*, *supra* at 465.

would modify it by shifting the balance back in favor of precedent and expanding on *Robinson*'s list of factors to consider in applying stare decisis.

I would hold that a stare decisis analysis should always begin with the presumption that upholding the precedent involved is the preferred course of action. The presumption should be retained until effectively rebutted by the conclusion that a compelling justification exists to overturn the precedent.

Robinson, by contrast, contained no such presumption. Moreover, the Court's applications of *Robinson* suggest that such a presumption was never considered. Even if it had been initially applied, once a case was deemed to have been wrongly decided, any presumption in favor of upholding precedent disappeared.[47] I would reject this approach and reiterate that a rebuttable presumption exists in favor of upholding precedent.[48]

The question arises what deference should be paid to cases in which *Robinson* was used to overturn existing precedent. I believe that a lower level of deference should be accorded to these cases because they represent a departure from the traditional notions of stare decisis. In

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[47] See, e.g., *Paige*, *supra* at 512 n 21 ("[T]he only instances in which we *might decline* to overrule [erroneous precedent] . . . is when it would produce chaos.") (emphasis added); *Hickman*, *supra* at 610 n 6 (noting that no special justification is necessary to overrule erroneous precedent); *People v Nutt*, 469 Mich 565, 575, 591; 677 NW2d 1 (2004) (concluding that the court is *compelled* to overrule erroneous precedent); *Petit*, *supra* at 633-34 (stating that courts *should* overturn erroneous decisions).

[48] I recognize and agree with *Robinson* that stare decisis is "not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions," nor is it "an inexorable command." *Robinson*, *supra* at 463-464. However, I again note that, if our stare decisis analysis leads to the Court overruling precedent *every time it is applied*, stare decisis becomes not an "inexorable command," but rather a meaningless exercise.

Adarand Constructors, Inc v Pena,[49] the United States Supreme Court expressly addressed the distinction between consideration of well-established law and cases representing a recent departure from precedent:

> It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa v Casey*. *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law." In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself. ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."). But in this case, as we have explained, we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event.[50]

Furthermore, the Court stated:

> Our past practice in similar situations supports our action today. In *United States v Dixon*, we overruled the recent case of *Grady v Corbin*, because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." In *Solorio v United States*, we overruled *O'Callahan v Parker*, which had caused "confusion" and had rejected "an unbroken line of

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[49] *Adarand Constructors, Inc v Pena*, 515 US 200; 115 S Ct 2097; 132 L Ed 2d 158 (1995).

[50] *Id*. at 233-234 (citations altered or omitted).

> decisions from 1866 to 1960." And in *Continental TV, Inc v GTE Sylvania Inc*, we overruled *United States v Arnold, Schwinn & Co*, which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." See also, *e.g., Payne v Tennessee* (overruling *Booth v Maryland*, and *South Carolina v Gathers*; *Monell v New York City Dept of Social Servs* (partially overruling *Monroe v Pape*, because *Monroe* was a "departure from prior practice" that had not engendered substantial reliance); *Swift & Co v Wickham* (overruling *Kesler v Department of Public Safety of Utah*, to reaffirm "pre-*Kesler* precedent" and restore the law to the "view . . . which this Court has traditionally taken" in older cases).[51]

Thus, there is substantial support for applying a decreased presumption in favor of precedent when that precedent itself represents a recent departure from prior established caselaw.[52]

The next inquiry should be whether there exists a compelling justification for overruling precedent.[53] A com-

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[51] *Id*. at 232-233 (citations altered or omitted).

[52] Other United States Supreme Court decisions also implicitly acknowledge that precedent that itself overruled recent precedent is entitled to a reduced presumption. See, e.g., *Randall v Sorrell*, 548 US 230, 244; 126 S Ct 2479; 165 L Ed 2d 482 (2006) (stating that precedent should only be overruled in exceptional cases, and that "[t]his is especially true where, as here, the principle has become settled through *iteration and reiteration over a long period of time*") (emphasis added); *United States v IBM*, 517 US 843, 856; 116 S Ct 1793; 135 L Ed 2d 124 (1996) (declining to overrule a case because it had "been controlling precedent *for over 80 years*") (emphasis added); *Welch v Texas Dep't of Highways & Pub Transportation*, 483 US 468, 493-494; 107 S Ct 2941; 97 L Ed 2d 389 (1987) (declining to overrule precedent that had "been adhered to without exception by this Court *for almost a century*") (emphasis added); and *CBOCS West, Inc v Humphries*, 553 US 442, 452; 128 S Ct 1951; 170 L Ed 2d 864 (2008) (declining to overturn "the well-embedded interpretation" of the statute at issue).

[53] Requiring a compelling justification to overrule precedent is consistent not only with most other jurisdictions, but also with United States

pelling justification is *not* a mere belief that a precedential case was wrongly decided or that the Court, as currently composed, would have decided the case differently. Rather, in determining whether a compelling justification exists, the Court should consider several evaluative criteria, none of which, standing alone, is dispositive.

These criteria include, but are not limited to: (1) whether the rule has proven to be intolerable because it defies practical workability, (2) whether reliance on the rule is such that overruling it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the rule was pronounced that no more than a remnant of the rule has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the rule is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from precedent.

Not all of these factors will be applicable in every case. Nor is there a magic number of factors that must favor overruling a case in order to establish the requisite compelling justification. Rather, I believe that the conclusion about whether these factors support finding a compelling justification should be reached on a case-by-case basis.

ii. APPLICATION OF STARE DECISIS TO *LANSING MAYOR*

As stated above, I begin my stare decisis analysis with a presumption in favor of upholding precedent.

Supreme Court precedent. See, e.g., *Planned Parenthood v Casey*, 505 US 833, 864; 112 S Ct 2791; 120 L Ed 2d 674 (1992).

Only if a compelling justification exists should the Court overrule the prior decision. Although *Lansing Mayor* was wrongly decided with respect to the definition of "ambiguity," this fact does not constitute the requisite compelling justification to overrule it. Instead, we must examine additional factors to determine whether there exists a compelling justification to overrule it.

First, I consider whether the method for discerning ambiguity in *Lansing Mayor* has proven intolerable because it defies practical workability. I believe that it does. Intrinsically, an analytical approach to interpreting statutes on the basis of their "plain meaning," where reasonable minds disagree on what that meaning is, is unworkable. This standard gives judges unfettered discretion to pick and choose among available "plain meanings" or dictionary definitions, and thus sheds little light on what the Legislature intended statutory language to mean.[54] It also potentially leads to arbitrary outcomes and injects instability into the law.

Moreover, the mere fact that different justices of this Court, judges of the Court of Appeals, and trial judges disagree on the meaning of statutory language suggests that ambiguity exists. Allowing a judge to pick one meaning among several equally plausible meanings without using the rules of statutory construction is quite simply an exercise in speculation. As Justice Stevens of the United States Supreme Court stated:

> [T]he "minimalist" judge who holds that the purpose of [a] statute may be learned only from its language retains greater discretion than the judge who will seek guidance

[54] See, e.g., *Fluor*, *supra* at 189 n 4 (KELLY, J., concurring) ("It is a bizarre notion that the language of a statute can have only one reasonable meaning when four separate independent entities have split on its correct interpretation.").

> from every reliable source. A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process.[55]

I share Justice Stevens's concerns and believe that *Lansing Mayor*'s definition of "ambiguity" is inherently unworkable.

I also note that application of *Lansing Mayor*'s definition of "ambiguity" has never once led the Court to find statutory language ambiguous.[56] If a rule of statutory interpretation inevitably leads to the same result in each case in which it is applied, such a rule is

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[55] *BedRoc Ltd, LLC v United States*, 541 US 176, 192; 124 S Ct 1587; 158 L Ed 2d 338 (2004) (Stevens, J., dissenting) (citations and quotation marks omitted).

[56] See, e.g., *Dimmit & Owens Fin, Inc v Deloitte & Touche*, 481 Mich 618; 752 NW2d 37 (2008); *Ross v Blue Care Network*, 480 Mich 153; 747 NW2d 828 (2008); *Wesche v Mecosta Co Rd Comm*, 480 Mich 75; 746 NW2d 847 (2008); *Ernsting v Ave Maria College*, 480 Mich 985 (2007); *Trentadue*, *supra*; *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007); *Brown*, *supra*; *Renny v Dep't of Transportation*, 478 Mich 490; 734 NW2d 518 (2007); *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518; 734 NW2d 533 (2007); *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007); *Bukowski v Detroit*, 478 Mich 268; 732 NW2d 75 (2007); *Karaczewski*, *supra*; *Fluor*, *supra*; *Rowland*, *supra*; *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006); *Paige*, *supra*; *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006); *Ford Motor Co v Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006); *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006); *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006); *People v Yamat*, 475 Mich 49; 714 NW2d 335 (2006); *Grimes*, *supra*; *Michigan v Monaco*, 474 Mich 48; 710 NW2d 46 (2006); *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36; 709 NW2d 589 (2006); *Co Rd Ass'n v Governor*, 474 Mich 11; 705 NW2d 680 (2005); *Devillers*, *supra*; *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005); *Ayar v Foodland Distributors*, 472 Mich 713; 698 NW2d 875 (2005); *Casco Twp*, *supra*; *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005); *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207; 696 NW2d 621 (2005); *Roberts v Atkins*, 470 Mich 679; 684 NW2d 711 (2004); *Neal*, *supra*; *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004); *Lively*, *supra*; *People v Laney*, 470 Mich 267; 680 NW2d 888 (2004); *Lansing Mayor*, *supra*.

innately unworkable. Accordingly, this factor weighs strongly in favor of abrogating the *Lansing Mayor* definition.

Second, I examine whether reliance on the rule is such that overruling it would cause a special hardship and inequity. I believe that litigants have reasonably relied on *Lansing Mayor*'s definition of "ambiguity."[57] Its application potentially leads to a different statutory interpretation than one based on alternative definitions. Hence, I conclude that rejecting the definition may prejudice current litigants who have relied on it.

However, I also recognize that litigants have continued to rely on previous standards for discerning ambiguity. This reliance is also reasonable given the inconsistent application of *Lansing Mayor*'s definition,[58] as well as the disagreement over the proper definition of

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[57] A review of filings in this Court and lower courts demonstrates that in post-2004 cases involving statutory interpretation, litigants often cite *Lansing Mayor* for the applicable definition of "ambiguity."

[58] Compare, e.g., *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 163-164; 744 NW2d 184 (2007) ("[W]hen a statute is ambiguous on its face and reasonable minds can differ with respect to its meaning, judicial construction is necessary to determine the intent of the Legislature."), with *Village of Holly v Holly Twp*, 267 Mich App 461, 474; 705 NW2d 532 (2005) ("Although reasonable minds may differ on the interpretation of subsection 3, that is not the test to determine whether a statutory ambiguity justifies judicial construction. 'Rather, a provision of the law is ambiguous only if it "irreconcilably conflict[s]" with another provision, . . . or when it is *equally* susceptible to more than a single meaning.' ") (citations omitted).

As the United States Supreme Court stated in *Pearson v Callahan*, 555 US 223, 129 S Ct 808, 818; 172 L Ed 2d 565 (2009), "[w]here a decision has been questioned by members of this Court in later decisions and has defied consistent application by the lower courts, these factors weigh in favor of reconsideration." (Quotation marks and punctuation omitted.) Thus, despite reliance on the new and old definitions of "ambiguity," it is noteworthy that the United States Supreme Court has held that inconsistent application of a new rule favors reexamination of that rule.

"ambiguity" among the justices of this Court.[59] Such reliance is not surprising given that *Lansing Mayor*'s definition is so vastly different from the definitions of "ambiguity" that preceded it for more than 150 years.[60] In fact, despite its explicit holding, *Lansing Mayor* did not overrule or cite *any* previous cases that addressed the proper method for discerning ambiguity.

Nevertheless, because *Lansing Mayor* stands as the most recent declaration of how to discern statutory ambiguity, litigants reasonably relied on it for this point. I therefore conclude that this factor weighs moderately in favor of upholding the definition.

Third, I consider whether related principles of law have so far developed since the *Lansing Mayor* definition of "ambiguity" was pronounced that only a remnant of the definition has survived. This factor is inapplicable to the stare decisis analysis in this case. The definition of "ambiguity" is a tool of judicial construction. Its only relevance is to discern ambiguity or the lack of it in a given statute. Thus, the definition of "ambiguity" stands alone and is not inherently related to other principles of law. Accordingly, this factor weighs neither in favor of nor against replacing the *Lansing Mayor* definition.

Fourth, I examine whether facts and circumstances have so changed, or have come to be seen so differently, as to rob the old definition of significant justification. This factor focuses on real-world practicalities.[61] How-

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[59] See *Stone v Williamson*, 482 Mich 144, 152, 173 & n 4; 753 NW2d 106 (2008).

[60] See, e.g., *Bidwell v Whitaker*, 1 Mich 469 (1850).

[61] See, e.g., *Casey*, *supra* at 860 (discussing how advancements in medical treatment since *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 [1972], was decided have not rendered the "factual underpinnings" of *Roe*'s central holding obsolete).

ever, the definition of "ambiguity" is not beholden to the underlying facts and circumstances of a given case. Accordingly, because the definition of "ambiguity" does not implicate practical concerns, I do not believe that this factor weighs in favor of or against replacing the *Lansing Mayor* definition.

Fifth, I consider whether other jurisdictions have decided similar issues in a different manner. My review indicates that *Lansing Mayor*'s definition of "ambiguity" is unsupported by any other jurisdiction. In fact, not a single jurisdiction, state or federal, requires an irreconcilable conflict between provisions or that language be equally susceptible to more than one meaning before finding statutory ambiguity.[62] Accordingly, this factor weighs strongly in favor of rejecting the *Lansing Mayor* definition.

I note that the sixth factor, whether upholding the *Lansing Mayor* definition is likely to result in serious detriment prejudicial to public interests, has no bearing on this case. As previously stated, the definition of "ambiguity" is merely a tool of statutory interpretation. As such, its application has no relevance to public interests because the definition of "ambiguity," standing alone, does not dictate any course of action in a particular case.

Finally, I consider whether the prior decision was an abrupt and largely unexplained departure from precedent. As noted earlier, *Lansing Mayor*'s definition of "ambiguity" is nothing more than a legal fiction, wholly unsupported by *any* law. Furthermore, it represented a decisive and abrupt shift from precedent without recognition of the prior standards for discerning statutory ambiguity. Accordingly, this factor weighs heavily in favor of abrogating *Lansing Mayor*'s definition of "ambiguity."

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[62] See *post* at 377.

Under my analysis of the aforementioned factors, *Lansing Mayor*'s definition of "ambiguity" has proven unworkable, is unsupported by other jurisdictions, and represents an abrupt and unexplained departure from precedent. Although it has been relied on in Michigan, reliance has been uneven and short-lived. Accordingly, I conclude that a compelling justification exists for replacing it.[63]

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[63] Justice MARKMAN has criticized my stare decisis analysis. I offer the following response.

(1) As I state *supra* at 313 n 36, I continue to believe that tools of statutory interpretation, such as the definition of "ambiguity," are not entitled to stare decisis status. However, Justice MARKMAN, other members of this Court, the Court of Appeals, and lower courts have treated *Lansing Mayor*'s definition of "ambiguity" as fully entitled to it. See *id*. Hence, a thorough analysis of that case's definition of "ambiguity" and its precedential worth is appropriate, even if not mandated.

(2) My fealty to stare decisis speaks for itself. As evidenced by this opinion, only because I find that, after a thorough examination of the relevant factors, a compelling justification exists for overruling precedent do I do so. This stands in stark contrast to the former majority's approach to stare decisis, as shown at notes 44 and 47 of this opinion.

(3) Justice MARKMAN claims that "when the previous majority overruled a precedent, it was to ensure that the decisions of this Court more closely reflected the judgments of the people's elected legislative representatives . . . ." *Post* at 391. This is simply a reflection of his personal opinion and that of the justices who shared his view in those cases. As indicated earlier, the former majority's overrulings showed little respect for the doctrine of stare decisis and developed a superficial rule in *Robinson* to deal with it. They disdained cases that had stood for many years before the former majority's ascension to the bench.

(4) Contrary to Justice MARKMAN's contention, I have not ignored precedent in any of the cases he cites. For a comprehensive response to Justice MARKMAN on this issue, see my concurring opinion in *Potter v McLeary*, 484 Mich 397, 426-429; 774 NW2d 1 (2009).

(5) Justice MARKMAN claims that I have never joined an opinion that articulates a "compelling justification" for upholding a prior decision that I believe was wrongly decided. This comes as no surprise, however. The finding of a compelling justification as a requisite to overruling precedent

2. THE PROPER METHOD OF DISCERNING AMBIGUITY

Having rejected the *Lansing Mayor* definition of "ambiguity," I now iterate the proper method of discerning statutory ambiguity. Before *Lansing Mayor* was decided, Michigan courts used several analogous variations of statutory interpretation. For example, in *In re MCI Telecom Complaint*,[64] we held that "[s]hould a statute be ambiguous on its face . . . so that reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine the meaning."[65] This Court has applied the "reasonable minds" standard on numerous other occasions.[66]

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has *never* been the standard in Michigan during my years as a justice. *Robinson* did not require a compelling justification to overrule precedent.

(6) Justice MARKMAN's claim that I "find[] it necessary to depart from the 150-year old standard [regarding stare decisis] that [I] previously hailed" is hopelessly off the mark. Justice MARKMAN *himself* joined the Court's opinion in *Robinson*, which established an unprecedented test for evaluating prior decisions of the Court. Although I objected to it, I followed *Robinson* in subsequent cases. See, e.g., *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 71; 729 NW2d 500 (2007) (KELLY, J., dissenting). Moreover, my position in *Rowland*, is entirely consistent with this opinion. As I stated in *Rowland*, "the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Rowland*, *supra* at 253-254, citing *United States v IBM*, *supra*. Only now do I expand upon *Robinson* and define the boundaries of a "compelling justification" because of *Robinson*'s insufficient deference to precedent.

[64] *In re MCI Telecom Complaint*, 460 Mich 396; 596 NW2d 164 (1999).

[65] *Id*. at 411-412. Justice CAVANAGH authored the opinion in *In re MCI*. Also signing it were then-Chief Justice WEAVER, Justices CORRIGAN, TAYLOR, and BRICKLEY, and myself. Justice YOUNG did not participate in the case.

[66] See, e.g. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003); *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000); *Yaldo v North Pointe Ins Co*, 457 Mich 341, 347; 578 NW2d 274 (1998); *Sam v Balardo*, 411 Mich 405, 418-419 n 9; 308 NW2d 142 (1981). *Petty*, authored by Justice CAVANAGH, was notably signed by then-Chief Justice CORRIGAN, Justices

This Court has also employed a "doubtful" standard in deciding whether ambiguity exists. In *Smith v Grand Rapids City Comm*,[67] we held that "[w]here . . . the language of a statute is of doubtful meaning, the court should give it a reasonable construction looking to the purpose to be subserved thereby, and the object sought to be accomplished and its occasion and necessity."[68]

Finally, this Court has used a "susceptible" standard. Applying this method of interpretation, we held that "[i]t is only where a statute is unclear and susceptible to more than one interpretation that judicial construction is allowed."[69] These corresponding approaches to evaluating statutes for ambiguity have endured in Michigan caselaw throughout the nineteenth and twentieth centuries.[70]

These historical standards for discerning ambiguity are easily reconcilable and analogous. The crux of the "reasonable minds" standard is that, when two persons reasonably afford different meanings to statutory language, it is ambiguous. As for the "doubtful" standard, it suggests that a statute is ambiguous when its language is of questionable or unclear meaning. The "susceptible" standard is self-

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WEAVER, TAYLOR, YOUNG, and MARKMAN, and myself. Yet Justices TAYLOR, CORRIGAN, YOUNG, and MARKMAN apparently chose to ignore *Petty* and the "reasonable minds" standard in *Lansing Mayor* and its progeny applying *Lansing Mayor*'s aberrant definition of "ambiguity."

[67] *Smith v Grand Rapids City Comm*, 281 Mich 235; 274 NW 776 (1934).

[68] *Id*. at 240-241 (citations omitted).

[69] *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995).

[70] See, e.g., *In re MCI*, *supra*; *Sam*, *supra*; *City of Lansing v Lansing Twp*, 356 Mich 641; 97 NW2d 804 (1959); *People v Detroit, G H & M R Co*, 228 Mich 596; 200 NW 536 (1924); *Crary*, *supra*; *Borden v Fletcher's Estate*, 131 Mich 220; 91 NW 145 (1902); *Lane v Ruhl*, 103 Mich 38; 61 NW 347 (1894); *Bidwell*, *supra*.

explanatory in that, if a statute is susceptible to more than one interpretation, it is ambiguous.

I adopt a definition of "ambiguity" that encompasses all three of the aforementioned well-established standards for determining ambiguity.[71] Specifically, I would hold:

> [W]hen there can be reasonable disagreement over a statute's meaning, or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, [a] statute is ambiguous. For example, this Court has concluded that statutes [are] ambiguous when one word in the statute has an unclear meaning, when a statute's interaction with another statute has rendered its meaning unclear, or when application of the statute to facts has rendered the correct application of the statute uncertain.[72]

This standard gleans the fundamental principles from the "reasonable minds," "doubtful," and "susceptible"

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[71] Justice MARKMAN claims that "[a] facile resort to ambiguity affords the judge a readily available means of acting beyond the scope of his or her authority to exercise exclusively the 'judicial power.' " *Post* at 366. It seems obvious that the "judicial power" must include the authority to interpret statutes as written and interpret ambiguity where appropriate. Also, misuse of our "judicial power" can certainly occur where ambiguity is never found and judges use few judicial tools to discern what they believe to be plain language.

Moreover, Justice MARKMAN questions "what . . . arguments [I] have for substantially expanding the range of judicial decision-making . . . ." *Post* at 376. I do not need an "argument," however, to defend my definition of "ambiguity," as it is supported by a multitude of cases in *every* state and *every* federal jurisdiction. See notes 73, 74, and 75 of this opinion. To the contrary, it is Justice MARKMAN who fails to advance any justification for the definition of "ambiguity" that he favors. As indicated earlier, that definition was based not on *any* precedent whatsoever, but rather derived from thin air. While he passionately decries that his definition is "fair," *post* at 379, and "grounded in logic and common sense," *post* at 375, whether a legal principle is "fair" or "logical" is highly subjective. Its fairness comes into serious question when it has no basis in the law.

[72] *Yellow Freight System Inc v Michigan*, 464 Mich 21, 38; 627 NW2d 236 (2001) (CAVANAGH, J., dissenting) (citations omitted), rev'd sub nom *Yellow Transp Inc v Michigan*, 537 US 36 (2002).

tests. It has been applied, in some variation, by every other state in the country,[73] all the federal circuit

[73] See, e.g., *AmSouth Bank v Holberg*, 789 So 2d 833 (Ala, 2001); *State v Saathoff*, 29 P3d 236 (Alas, 2001); *State v Gomez*, 212 Ariz 55; 127 P3d 873 (2006); *Yamaha Motor Corp, USA v Richard's Honda Yamaha*, 344 Ark 44; 38 SW3d 356 (2001); *Hughes v Bd of Architectural Exam'rs*, 17 Cal 4th 763; 72 Cal Rptr 2d 624; 952 P2d 641 (1998); *State v Nieto*, 993 P2d 493 (Colo, 2000); *State v Marsh & McLennan Companies, Inc*, 286 Conn 454; 944 A2d 315 (2008); *LeVan v Independence Mall, Inc*, 940 A2d 929 (Del, 2007); *State v Huggins*, 802 So 2d 276, 277 (2001); *Aldrich v City of Lumber City*, 273 Ga 461; 542 SE2d 102 (2001); *Barnett v State*, 91 Hawaii 20; 979 P2d 1046 (1999); *State v Yzaguirre*, 144 Idaho 471; 163 P3d 1183 (2007); *In re BC*, 176 Ill 2d 536; 680 NE2d 1355 (1997); *In re Lehman*, 690 NE2d 696, 702 (Ind, 1997); *City of Waterloo v Bainbridge* 749 NW2d 245 (Iowa, 2008); *State v Paul*, 285 Kan 658; 175 P3d 840 (2008); *Revenue Cabinet v Rohm & Haas Ky Inc*, 929 SW2d 741 (Ky App, 1996); *Burnette v Stalder*, 789 So 2d 573 (La, 2001); *In re Estate of Kingsbury*, 946 A2d 389 (Me, 2008); *Twine v State*, 395 Md 539; 910 A2d 1132 (2006); *Town of Falmouth v Civil Serv Comm*, 447 Mass 814; 857 NE2d 1052 (2006); *Amaral v Saint Cloud Hosp*, 598 NW2d 379 (Minn, 1999); *Dawson v Townsend & Sons, Inc*, 735 So 2d 1131 (Miss App, 1999); *State v Graham*, 204 SW3d 655 (Mo, 2006); *Montana Contractors Ass'n, Inc v Dep't of Highways*, 220 Mont 392; 715 P2d 1056 (1986); *State ex rel Johnson v Marsh*, 149 Neb 1; 29 NW2d 799 (1947); *Chanos v Nevada Tax Comm*, 181 P3d 675 (Nev, 2008); *In re Baker*, 154 NH 186; 908 A2d 806 (2006*); Fairway Dodge, LLC v Decker Dodge, Inc*, 191 NJ 460; 924 A2d 517 (2007); *Maestas v Zager*, 141 NM 154; 152 P3d 141 (2007); *Charter Dev Co v City of Buffalo*, 6 NY3d 578; 815 NY Supp 2d 13; 848 NE2d 460 (2006); *Morris v Thomas*, 161 NC App 680; 589 SE2d 419 (2003); *Walberg v Walberg*, 748 NW2d 702 (ND, 2008); *Clark v Scarpelli*, 91 Ohio St 3d 271; 744 NE2d 719 (2001); *YDF, Inc v Schlumar, Inc*, 136 P3d 656 (Okla, 2006); *State v Cooper*, 319 Or 162; 874 P2d 822 (1994); *Pridgen v Parker Hannifin Corp*, 588 Pa 405; 905 A2d 422 (2006); *Unistrut Corp v Dept of Labor & Training*, 922 A2d 93 (RI, 2007); *Kennedy v South Carolina Retirement Sys*, 345 SC 339; 549 SE2d 243 (2001); *Zoss v Schaefers*, 598 NW2d 550 (SD, 1999); *Sallee v Barrett*, 171 SW3d 822 (Tenn, 2005); *In re Missouri P R Co*, 998 SW2d 212 (Tex, 1999); *Martinez v Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 164 P3d 384 (Utah, 2007); *Green Mountain Power Corp v Sprint Communications*, 172 Vt 416; 779 A2d 687 (2001); *Brown v Lukhard*, 229 Va 316; 330 SE2d 84 (1985); *Yakima v Int'l Ass'n of Fire Fighters*, 117 Wash 2d 655; 818 P2d 1076 (1991); *Phillips v Larrys Drive-In Pharmacy, Inc*, 220 W Va 484; 647 SE2d 920 (2007); *State v Williams*, 198 Wis 2d 479; 544 NW2d 400 (1996); *Story v State*, 755 P2d 228 (Wy, 1988).

courts,[74] and the United States Supreme Court.[75]

B. APPLICATION TO § 315(1)

I believe that § 315(1) is ambiguous because the statute is capable of being understood by reasonably well-informed persons in two or more different senses. As mentioned before, the term "prorate" could reasonably be understood to apply to employers, their insurance providers, health care providers, and to employees seeking workers' compensation benefits. Indeed, § 315 and the entire WDCA are entirely silent as to who, among these parties, is subject to a proration of attorney fees. Absent extra-textual sources, any determination of the Legislature's intent becomes a mere exercise in speculation. Thus, having found that § 315(1) is ambiguous, I may now look to extra-textual sources to aid in its interpretation.[76]

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[74] See, e.g., *United States v O'Neil*, 11 F3d 292, 297-298 (CA 1, 1993); *Natural Resources Defense Council v Muszynski*, 268 F3d 91, 98 (CA 2, 2001); *Dobrek v Phelan*, 419 F3d 259, 264 (CA 3, 2005); *Newport News Shipbuilding & Dry Dock Co v Brown*, 376 F3d 245, 248 (CA 4, 2004); *United States v Lowe*, 118 F3d 399, 402 (CA 5, 1997); *Saxion v Titan-C-Mfg Inc*, 86 F3d 553, 560 (CA 6, 1996); *Williams v Banning*, 72 F3d 552, 554 (CA 7, 1995); *Design Professionals Ins Co v Chi Ins Co*, 454 F3d 906, 910 (CA 8, 2006); *Mt Adams Veneer Co v United States*, 896 F2d 339, 342 (CA 9, 1990); *Wright v Fed Bureau of Prisons*, 451 F3d 1231, 1235 (CA 10, 2006); *Med Transportation Mgt Corp v Comm'r of Internal Revenue Service*, 506 F3d 1364, 1368 (CA 11, 2007); *United States v Villanueva-Sotelo*, 380 US App DC 11; 515 F3d 1234, 1237 (2008); *Butterbaugh v Dep't of Justice*, 336 F3d 1332, 1339 (CA Fed, 2003).

[75] See, e.g., *Gonzales v Oregon*, 546 US 243, 258; 126 S Ct 904; 163 L Ed 2d 748 (2006); *Houghton v Payne*, 194 US 88, 99; 24 S Ct 590; 48 L Ed 888 (1904).

[76] I find it noteworthy that none of the dissents in this case characterizes § 315(1) as unambiguous under any of the historical standards for discerning ambiguity or the definition enunciated in *Lansing Mayor*.

1. HARMONIZATION WITH THE WDCA

I seek an interpretation of § 315(1) that is in accord with the principles underlying the WDCA as a whole. The act is remedial in nature.[77] Thus, where ambiguity exists and judicial construction of the act is necessary, we construe the act's terms liberally to grant rather than deny benefits to injured workers.[78] This canon of statutory construction is deeply embedded in both American and Michigan jurisprudence.[79]

The WCAC has explicitly recognized the importance of holding employers and their insurance carriers responsible for a proration of attorney fees pursuant to § 315(1). In *Harvlie v Jack Post Corp*, the WCAC stated, "[T]he purpose of [the] attorney fee provisions . . . is not merely to assure that a claimant's attorney is paid, but also *to deter employers from breaching their statutory duty to provide medical treatment to injured workers*."[80]

I find this reasoning persuasive and applicable to this case. If employers and their insurance carriers are not held accountable for a prorated share of attorney fees, they will have an incentive to deny medical benefits.[81]

However, Justice HATHAWAY, in her concurring opinion, opines that § 315(1) is unambiguous. A claim that a provision is ambiguous or unambiguous is best accompanied by a discussion of what constitutes statutory ambiguity or lack thereof. Yet Justice HATHAWAY fails to address this step in the process of statutory interpretation.

[77] *Sabotka v Chrysler Corp*, 447 Mich 1, 20 n 18; 523 NW2d 454 (1994).

[78] *Paschke v Retool Industries*, 445 Mich 502, 511; 519 NW2d 441 (1994), citing *Bower v Whitehall Leather Co*, 412 Mich 172, 191; 312 NW2d 640 (1981).

[79] See *Haynes*, *supra* at 42-44 (KELLY, J., concurring).

[80] *Harvlie v Jack Post Corp*, 2006 Mich ACO 69, p 5, citing *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959) (emphasis added).

[81] The dissents argue that my interpretation of § 315(1) will penalize employers who validly contest an employee's claim for benefits. This is

They will be tempted to deny an injured employee's request for coverage in the hope that, in subsequent litigation, they will not be found liable. And even if they were found liable, they would be responsible only for actual medical expenses but not for attorney fees, despite their wrongful denial of valid claims.

Likewise, if injured workers were forced to pay a prorated portion of their own attorney fees, their ultimate recovery could be reduced below their actual costs of securing medical treatment. Such a result would violate the remedial goal of the WDCA.

2. CASELAW HAS EMPLOYED SIMILAR REASONING

Caselaw also supports my interpretation of § 315(1). I find persuasive the fact that every previous case that has analyzed § 315(1) with respect to the proration of attorney fees has employed reasoning similar to mine.

The Court of Appeals first considered the proration of attorney fees pursuant to § 315(1) in *Boyce v Grand*

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not the case. Nothing in this opinion can be construed as *requiring* a magistrate to prorate fees against an employer or the employer's insurance carrier. Furthermore, even if there were a wrongful denial of medical treatment under § 315(1), the magistrate is vested with the *discretion* not to prorate fees. Thus, the denial of a treatment, whether valid or not, on its own, does not assure that an employer or its insurance carrier will be subject to a proration of attorney fees.

Justice YOUNG correctly asserts that "a workers' compensation claimant is ordinarily responsible for his own personal attorney fees." *Post* at 347. However, § 315(1) deals not with attorney fees for a workers' compensation claim generally, but with attorney fees specifically related to an employer's failure, neglect, or refusal to pay for "reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed." MCL 418.315(1). Thus, a workers' compensation claimant generally remains responsible for his or her attorney fees unrelated to the matters governed by § 315(1).

Rapids Asphalt Paving Co.[82] There, the plaintiff argued that his health care provider should be held responsible for a portion of his attorney fees. The Court rejected this argument, noting that a party does not become liable for attorney fees merely by accepting the benefits of an attorney's services.[83] The Court also ruled that § 315(1) could be construed to require either the employer or its insurance carrier to pay a plaintiff's attorney fees.

Finally, the Court noted that Administrative Rule 14 of the Bureau of Workers' Compensation, which was in effect when the plaintiff was injured, precluded attorneys from recovering a percentage fee for accrued medical services.[84] The Court questioned the soundness of Rule 14, noting that requiring employers or insurance carriers to pay attorney fees when they refuse to pay mandatory medical benefits would serve justice.[85]

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[82] *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546; 324 NW2d 28 (1982).

[83] *Id*. at 549-550.

[84] Before 1979, Rule 14 provided that a plaintiff's attorney shall deduct reasonable expenses before computing a fee. These included expenses for hospitals, surgery, medical providers, and burials. However, the statute was amended in 1979, and the Legislature removed these from the expenses an attorney is precluded from recovering. Thus, Rule 14 no longer prevents attorneys from recovering a percentage attorney fee assigned by a recovery of medical services. *Watkins v Chrysler Corp*, 167 Mich App 122, 131 n 1; 421 NW2d 597 (1988).

[85] *Boyce*, *supra* at 551-552 n 45. In *Zeeland Community Hosp v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984), the Court of Appeals applied analogous reasoning. Examining § 315(1), it noted, "Since the clause concerning attorney fees follows the clause concerning the employer's refusal to pay the employer's reasonable medical expenses, the final sentence is logically construed to require either the employer or the insurance carrier to pay a portion of [a plaintiff's] attorney fees." *Id*. at 823-825. The Court also held that the statute does not evince an intent by the Legislature to require health care providers to pay a portion of attorney fees. *Id*.

In *Watkins v Chrysler Corp*,[86] the Court of Appeals reaffirmed the principle expounded in *Boyce* that the term "prorate" in the final sentence of § 315(1) applies to employers and their insurance carriers. *Watkins* involved an injured plaintiff who sought and was awarded workers' compensation benefits. He subsequently requested a hearing regarding his right to attorney fees related to medical expenses ultimately paid by Blue Cross Blue Shield of Michigan. The magistrate ruled that he was not entitled to such fees. The Workers' Compensation Appeal Board (WCAB) reversed the magistrate's decision and awarded attorney fees to be paid by the plaintiff's employer.

On appeal, the Court of Appeals reversed, holding that the imposition of attorney fees under § 315(1) would be unconscionable. It noted that the plaintiff's medical expenses had been timely paid and that there had been no neglect, breach of duty, or failure to provide medical care.[87] Nonetheless, the Court reiterated that the WCAB had improperly ignored the policy aspect of *Boyce* that an employer and its insurer should bear attorney fees when medical expenses are not timely paid.[88]

In contrast to *Watkins*, defendants in this case did not timely pay plaintiff's medical expenses such that there was no neglect, breach of duty, or failure to provide

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The Court of Appeals used the same reasoning in *Duran v Sollitt Constr Co*, 135 Mich App 610, 615; 354 NW2d 277 (1984), which noted that § 315(1) "seems to refer to payment by the employer or his insurer . . . ." Moreover, the *Duran* Court agreed with *Boyce* that the statute precluded an assessment of attorney fees against a health care provider. *Id*.

[86] *Watkins v Chrysler Corp*, 167 Mich App 122; 421 NW2d 597 (1988).

[87] *Id*. at 132.

[88] *Id*. at 131-132, citing *Boyce*, *supra* at 551-552 n 45.

medical care. Midwest failed to pay medical expenses *despite* the fact that it was paying other workers' compensation benefits to plaintiff. As the WCAC noted, Midwest knew of plaintiff's medical bills well in advance of trial, yet simply refused to pay them. Thus, the employer "fail[ed], neglect[ed], or refus[ed]" to furnish reasonable medical expenses for plaintiff's injuries under § 315(1).[89]

Finally, in *Harvlie v Jack Post Corp*,[90] the Court of Appeals found a unity of purpose for § 315(1) by holding that its last sentence authorizes a magistrate to prorate attorney fees among an employer and its insurance carrier. The Court held:

> Here, the WCAC majority's construction of § 315(1) is consistent with a harmonious reading of the last two sentences of § 315(1). The third sentence of § 315(1) provides that "the . . . magistrate may prorate attorney fees at the contingent fee rate paid by the employee." Standing alone, this sentence contains ambiguity because it fails to identify whom the magistrate may order to pay the attorney fees. This sentence is not to be construed in isolation, however, but instead must be read in the context of the whole statute and harmonized with the statute's other provisions in a manner that effectuates the purpose intended by the Legislature. The second sentence of § 315(1) addresses the consequences of an employer's failure to pay medical expenses and authorizes a magistrate to order the employer to reimburse either the injured claimant or the claimant's medical insurance provider for the reasonable medical expenses incurred. This second sentence addresses the consequences to a nonpaying employer that "fails, neglects, or refuses" to provide reasonable medical services. The WCAC properly construed the final two sentences of § 315(1) and provided a unity of purpose for this statute.[91]

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[89] See *Watkins*, *supra* at 132.

[90] *Harvlie v Jack Post Corp*, 280 Mich App 439; 760 NW2d 277 (2008).

[91] *Id*. at 445-446 (citations omitted).

The Court noted that its holding was consistent with prior interpretations of 315(1).[92]

In sum, I agree with the magistrate, the WCAC, the Court of Appeals, and established caselaw that employers and their insurance carriers are the only parties subject to a proration of attorney fees under § 315(1). This interpretation harmonizes the last sentence of § 315(1) with the preceding sentences of the provision as well as with the remedial goals of the WDCA. Workers' compensation magistrates may thus prorate an employee's attorney fees incurred in procuring payment for medical expenses against an employer, or against its insurance carrier, or against both.

Here, the magistrate's proration of attorney fees against defendants was appropriate, given defendants' failure to pay plaintiff's medical services as mandated by § 315(1). Accordingly, I conclude that the magistrate properly prorated plaintiff's attorney fees under § 315(1) against Midwest and Magna.

III. THE INAPPLICABILITY OF THE AMERICAN RULE

Finally, I note that Michigan courts follow the so-called "American rule" with respect to the payment of attorney fees.[93] We have held that, "[u]nder the American rule, attorney fees are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award."[94] This rule is codified at MCL 600.2405(6), which provides that among items that may be taxed as

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[92] *Id*. at 446.

[93] *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005).

[94] *Id*. at 707.

costs are "[a]ny attorney fees authorized by statute or court rule."[95]

Here, § 315(1) explicitly grants magistrates the discretionary authority to prorate attorney fees related to an employer's failure to provide services in accordance with the statute. Thus, the statute contemplates that a party other than a plaintiff could, in the discretion of the magistrate, be ordered to pay attorney fees in connection with a plaintiff's suit. Accordingly, § 315(1) constitutes an express statutory authorization of attorney fees, which trumps the otherwise applicable American rule.

IV. CONCLUSION

I recommend that the Court modify and expand the principles set forth in *Robinson v Detroit* governing when the Court should depart from the principle of stare decisis. A stare decisis analysis should always begin with a presumption that upholding precedent is the preferred course of action. Next, the Court should determine whether a compelling justification exists to overturn the precedent. A compelling justification is not a mere belief that the precedential case was wrongly decided or that the Court as currently composed would have decided the case differently. The factors listed in this opinion should be used on a case-by-case basis to determine whether a compelling justification exists to overrule an existing precedent.

However, consistent with United States Supreme Court precedent, I would accord a lower level of deference to cases that represent a recent departure from the traditional notions of stare decisis.

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[95] The American rule stands in contrast to the English rule. Under the English rule, the losing party pays the prevailing party's attorney fees and costs absent an exception. *Id*.

I also reject as unworkable the definition of statutory ambiguity espoused in *Lansing Mayor*. I conclude that MCL 418.315(1) is ambiguous because it is capable of being understood by reasonably well-informed persons in two or more different senses. As a consequence, the statute fails to clearly indicate the parties among whom attorney fees may be prorated.

Finally, we would hold that the Legislature intended that the term "prorate" in the last sentence apply only to employers and their insurance carriers. This construction is consistent with well-established principles of statutory interpretation, caselaw, the remedial nature of the WDCA, and the purpose of § 315(1). I would also hold that the American Rule of attorney fees does not apply to § 315(1).

Plaintiff's motion to dismiss defendants' application for leave to appeal is considered, and it is denied. We affirm the judgment of the Court of Appeals.

CAVANAGH, J., concurred with KELLY, C.J.

HATHAWAY, J. (*concurring*). I concur in the lead opinion only to the extent that it concludes that the term "prorate" in MCL 418.315(1) applies exclusively to employers and their insurance carriers. I write separately because I do not find MCL 418.315(1) to be ambiguous. Section 315(1), when read as a whole, indicates that the term "prorate" in MCL 418.315(1) applies only to employers and their insurance carriers.

This is a case of statutory interpretation. The proper interpretation and application of a statute presents a question of law, which receives de novo review.[1] Assuming that the Legislature has acted within its constitu-

[1] *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

tional authority, the purpose of judicial statutory construction is to discern and give effect to the intent of the Legislature.[2] In determining the intent of the Legislature, this Court must first look to the language of the statute.[3] The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature.[4] As far as possible, effect should be given to every phrase, clause, and word in the statute.[5] The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.[6] Moreover, when considering the correct interpretation, the statute must be read as a whole.[7] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[8] While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase, as well as its placement and purpose in the statutory scheme.[9] A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.[10] The statute must be interpreted in a manner which ensures that it works in harmony with the entire statutory scheme.[11]

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[2] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[3] *Id*.

[4] *Id.*

[5] *Id*. at 237.

[6] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[7] *Sun Valley*, *supra* at 237.

[8] *Herman*, *supra* at 366.

[9] *Id.*, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[10] *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930).

[11] *Id*. at 234.

To determine the intent of MCL 418.315(1), the plain language of the statute must first be examined. Section 315(1) provides in pertinent part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The *employer or the employer's carrier* may file a petition objecting to the named physician selected by the employee and setting forth reasons for the objection. If *the employer or carrier* can show cause why the employee should not continue treatment with the named physician of the employee's choice, . . . the . . . magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician . . . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the workers' compensation magistrate. *The workers' compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee*. [Emphasis added.]

Section 315(1) gives magistrates the discretionary authority to prorate attorney fees at the contingent fee rate paid by the employee. The question in this case is against whom attorney fees can be prorated.

Although I disagree with the lead opinion that the final sentence of § 315(1) is ambiguous, I agree with its conclusion that the final sentence of § 315(1) applies only to employers and their insurance carriers. This interpretation of the statute harmonizes the individual

sentences and phrases in § 315(1) with each other. The final sentence of § 315(1) cannot be construed to stand alone without reading it in the context of the entire statute.[12] It must be examined and analyzed as part of the particular statutory provision and then harmonized with the statute's other provisions to satisfy the purpose intended by the Legislature.[13]

Section 315(1) pertains to employer liability to pay medical benefits to workers injured in the course of employment. Section 315(1) mandates that employers furnish an employee with medical treatment needed for an injury arising out of and in the course of employment. The statute also enumerates certain types of treatment for which reimbursement costs can be contested by employers and their insurance carriers. However, if an employer fails, neglects, or refuses to provide covered medical expenses, the employer must reimburse the employee for the expenses, or make a payment to a medical provider for unpaid expenses that may be owing. The last sentence of § 315(1) gives a magistrate the discretion to prorate attorney fees at the contingent fee rate paid by the employee to recoup costs expended to recover medical expenses. Thus, the term "prorate" in the final sentence of the § 315(1), when read with the rest of the statute, applies to parties who might contest the payment of medical benefits: employers and their insurance carriers. This interpretation provides a unity of purpose for § 315(1).

In closing, I concur only with of the lead opinion's conclusion that the term "prorate" in MCL 418.315(1) applies exclusively to employers and their insurance carriers. I write separately because I do not find that

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[12] *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008).

[13] *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993).

§ 315(1) is ambiguous. Section 315(1), when read as a whole, indicates that the term "prorate" in § 315(1) applies only to employers and their insurance carriers. This interpretation harmonizes the final sentence of the statute with the entire statute as a whole.

WEAVER, J., concurred with HATHAWAY, J.

CORRIGAN, J. (*dissenting*). I fully join Justice MARKMAN's dissenting opinion. I also join part II(B) of Justice YOUNG's dissenting opinion.

YOUNG, J. (*dissenting*). I fully join in part IV of Justice MARKMAN's dissenting opinion. I further dissent from the majority's conclusion that "the term 'prorate' in MCL 418.315(1) applies *only* to employers and their insurance carriers,"[1] and with Chief Justice KELLY's conclusion that a workers' compensation claimant may *never* be deemed responsible for a portion of the attorney fees incurred because doing so would "violate the remedial goal of the [Worker's Disability Compensation Act]."[2]

Normally, a workers' compensation claimant is responsible for bearing the costs of his portion of the litigation, including attorney fees.[3] I believe that MCL 418.315(1) serves as an exception to this general rule, permitting the magistrate to prorate attorney fees between the claimant and the employer when the employer refuses to pay "reasonable" and "needed" medical expenses for an injury "arising out of and in the

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[1] *Ante* at 303.

[2] *Ante* at 333 (emphasis added).

[3] *Gilroy v Gen Motors Corp* (*After Remand*), 438 Mich 330, 340; 475 NW2d 271 (1991) ("As in any other civil litigation, a workers' compensation claimant is ordinarily responsible for personal attorney fees."); see also *Gross v Great Atlantic & Pacific Tea Co*, 87 Mich App 448; 274 NW2d 817 (1978).

course of employment." When an employer unjustifiably refuses to fulfill its statutory duty to pay for medical expenses incurred as a result of a work-related injury, it is entirely appropriate for the magistrate to consider whether to exercise the discretionary powers the Legislature has provided to prorate the fees between the parties according to the respective merits of their positions. In sum, the discretionary authority to prorate is a fee shifting power that *reduces* the claimant's usual obligation to bear the entire burden of his own attorney fees.

In contrast, the majority allows only proration between the employer and its insurer, while the claimant is relieved of paying any portion of his attorney fees. As such, the majority position must be predicated on the assumption that *every* claim for benefits is meritorious and that any contest of such a claim venal. The reality is that some claims have merit and some should be contested; others may involve unresolved factual and legal questions under the Worker's Disability Compensation Act (WDCA) that can be definitively resolved only by the magistrate and the Workers' Compensation Appellate Commission (WCAC). In consideration of this reality, I believe that the proration provision was a legislative recognition that neither the employer nor the claimant may have entirely meritorious positions in a particular case. Thus, the magistrate has been authorized to "split the baby" and divide the claimant's fees when the respective merits of the party's positions warrant this. The majority does not prorate so much as shift the *entire* attorney fee burden from the claimant to the employer in every case.

I. STATUTORY CONSTRUCTION

The statute at issue, MCL 418.315(1), provides in relevant part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

It is clear that an employer has an affirmative statutory obligation to furnish "reasonable" medical treatment for personal injuries "arising out of and in the course of employment" when such treatment is "needed." However, if the employer fails to do so, the statute provides two options. If the claimant has paid the medical expenses, the "employee shall be reimbursed for the reasonable expense." However, if the expenses remain "unpaid," "payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate." This sentence gives the magistrate the discretion to direct payment to the third-party medical provider on "behalf of the employee." The last sentence provides that the "worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." As I agree with the majority that the word "prorate" simply means to divide or distribute proportionately, the question in this case is simply whether the attorney fees are to be divided between the claimant and the employer, or the claimant and the medical provider.[4]

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[4] For the reasons explained earlier, I believe that the majority has simply concluded that the employer must *always* pay the claimant's

Reading the first sentence of the statutory provision together with the last two sentences leads to the conclusion that the fees *may* be prorated between the claimant and the employer. The first sentence establishes an affirmative duty on the employer to pay reasonable medical expenses for work-related injuries. However, if the employer "fails, neglects, or refuses so to do," payment can be compelled, either by reimbursing the claimant or paying the claimant's medical creditors directly. The last sentence of the statute relates to the sentence preceding it, permitting the proration of attorney fees between the parties when the employer "fails, neglects, or refuses" to pay needed and reasonable medical expenses related to the claimant's work-related injury. In effect, this provision permits shifting to the employer some of the attorney fee burden that the claimant would otherwise bear.

II. ANALYTIC PROBLEMS WITH THE MAJORITY

A

Contrary to the majority's analysis, there is no principled basis to distinguish an employer from its insurance carrier for the purposes of prorating attorney fees. It makes little sense to suggest, as the majority does, that the claimant's attorney fees can only be *prorated*

attorneys fees. While Justice MARKMAN's interpretation of the statute is certainly plausible, I do not believe that the structure or language of MCL 418.315(1) evinces any legislative intent to impose attorney fees upon third-party medical creditors who are not parties to the litigation, did not contract with or agree to the services of the plaintiff's attorney, and are entitled to the entirety of their fees (subject only to the cost containment rules) both as a matter of statute and as a matter of contract. See MCL 418.315(2); *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546; 324 NW2d 28 (1982); *Zeeland Community Hosp v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984); and *Duran v Sollitt Constr Co*, 135 Mich App 610; 354 NW2d 277 (1984).

between the employer and its carrier. The reasons are fairly obvious. The statute does not say that proration can *only* occur between an employer and its insurer. Moreover, when an employer is *insured*, its carrier is merely its agent: the insurer's duty is to indemnify and defend its insured according to the terms of the insurance contract.[5] In the case of a *self-insured* employer, the majority's analysis makes even less sense since there is only one entity—the employer—and thus no one with whom to prorate, as the majority has exempted the claimant from the proration equation. *En fin*, whether the employer is self-insured or insured, the claim is paid from the same pocket. Thus, the majority deprives the word "prorate" of any value under any circumstance, and employers will always bear the *entire* cost of attorney fees. If the Legislature had intended that *only* the employer pay a claimant's attorney fees, it could have easily said as much and presumably would have done so in much more direct language.

B

As noted, this Court and the WDCA have long recognized that a workers' compensation claimant is ordinarily responsible for paying his own personal attorney fees.[6] The majority's holding that workers' compensation claimants are categorically excluded from *ever* paying *any* portion of their attorney fees under MCL 418.315(1) represents a major departure from our caselaw and is inconsistent with MCL 418.858, which permits the director to limit the "maximum attorney

[5] *Blackwell v Citizens Ins Co of America*, 457 Mich 662; 579 NW2d 889 (1998).

[6] See n 3 *supra.* The majority does not mention this authority, nor does it overrule it.

fees" "paid by the employee."[7] This legislative enactment, permitting the limitation of attorney fees for those representing injured workers in a workers' compensation claim, applies exclusively to disputes between attorneys and their clients[8] and recognizes that attorney fees are generally payable by the claimant.[9] Thus, contrary to the majority's claim that requiring a claimant to pay a portion of his attorney fees would "violate the remedial goal of the WDCA," decades of caselaw, as well as the plain language of MCL 418.858(2), indicate otherwise.

C

The majority holds that the term "prorate" is limited to "the parties who might contest the payment of medical benefits: employers and their insurance carriers."[10] As an initial matter, nothing in the language of this provision limits the term "prorate" to the party "*contesting*" the payment of medical benefits, to the exclusion of the party "*seeking*" the payment of medical benefits. The majority adds language to the statute because the majority imagines that an employer might "be tempted to deny an injured employee's request for coverage in the hope that, in subsequent litigation, *they*

[7] MCL 418.858(2). The predecessor of this statutory provision was first enacted in 1912. See 1912 (1st Ex Sess) PA 10, part III, § 10; *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8; 153 NW 49 (1915).

[8] See *Gross*, *supra* at 451 (MCL 418.858 "applies to disputes between attorneys and their clients; it does not apply to disputes between parties.").

[9] See *May v Charles Hoertz & Son*, 204 Mich 432; 170 NW 305 (1919); *Pearson v Gillard*, 231 Mich 541; 204 NW 725 (1925); *Vellenoweth v Gen Motors Bldg Corp*, 247 Mich 274; 225 NW 522 (1929); *Rench v Kalamazoo Stove & Furnace Co*, 290 Mich 476; 287 NW 884 (1939).

[10] *Ante* at 309.

will not be found liable."[11] However, contrary to the apparent beliefs of the majority, an employer is not statutorily liable for every medical expense submitted by a claimant. Rather, pursuant to MCL 418.315, an employer is only obligated to pay *reasonable* and *needed* medical expenses for *work-related injuries*. I find nothing strange or reprehensible, much less unlawful, about an employer declining to pay medical expenses that it had *no legal obligation* to pay.

Where there are legitimate legal or factual disputes to be resolved on disputed workers' compensation claims, the hearing before the workers' compensation magistrate is the *sole* mechanism that settles those disputes and determines whether the medical treatment was needed and reasonable, and whether the medical treatment was related to "a personal injury arising out of and in the course of employment." While employers should be discouraged from *wrongly* denying medical benefits, the majority articulates no legal or logical basis for concluding that an employer should be discouraged from or punished for *correctly* denying claims to which a claimant is not entitled, or from seeking a resolution of arguable legal or factual disputes that call into question the employer's obligation to pay.[12]

Here, Chief Justice KELLY's lead opinion states that "the magistrate's proration of attorney fees against

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[11] *Ante* at 333 (emphasis added).

[12] This is consistent with the WCAC's treatment of MCL 418.315(1), which permitted the award of attorney fees "in cases where an employer or carrier has failed, neglected, or refused to pay for medical services a claimant is clearly entitled to. Thus, an attorney fee may be awarded *only* where there was non-payment *in the face of a 'clear entitlement*.' " *Beattie v Wells Aluminum Corp*, 2005 ACO 157 at 10-11 (emphasis added). See also *Scheland v Jet Box Co*, 1995 ACO 242; *Gessner v Keeler Brass Co*, 1997 ACO 548; *Gronley v St Clair Fiberglass, Inc*, 2001 ACO 298; *Sikkema v Taylor Carving, Inc*, 1992 ACO 469.

defendants was appropriate, given defendants' failure to pay plaintiff's medical services as mandated by § 315(1)."[13] However, in this case, where plaintiff was a "leased" employee, there were genuine factual and legal issues to be resolved regarding whether Koleaseco or BCN Transportation Services was plaintiff's employer, and whether a valid workers' compensation insurance policy existed between BCN Transportation and Midwest Employers Casualty Company. In light of these unresolved issues, it is unclear that Midwest unreasonably refused to pay plaintiff's medical benefits. Moreover, the magistrate did not find that Midwest unreasonably refused to pay medical benefits as the basis for assessing attorney fees against Midwest. Rather, the magistrate assessed attorney fees against Midwest on the basis of the "substantial amount of work" and time expended by plaintiff's counsel in litigating the case. However, awarding attorney fees based on the amount of work and time expended by the attorney is in direct contravention of the last sentence of § 315(1), which contemplates the payment of attorney fees on a *contingent* rather than hourly system. I would remand this case to the magistrate to assess the issue of attorney fees under the appropriate legal standard.

MARKMAN, J. (*dissenting*). Because I disagree with the majority interpretation of the statute in controversy, MCL 418.315, I respectfully dissent.[1]

I. BACKGROUND

Plaintiff, a truck driver, fell off his truck and injured his back while working. He sought workers' compensation benefits under the Worker's Disability Compensation

[13] *Ante* at 337.

[1] By the "majority interpretation," I refer only to the *result* reached by a majority of this Court in the opinions of the Chief Justice (joined by Justice CAVANAGH) and Justice HATHAWAY (joined by Justice WEAVER).

Act (WDCA), MCL 418.101 et seq. The magistrate granted benefits and medical costs to plaintiff, and also imposed $46,034 against defendants for plaintiff's attorney fees pursuant to MCL 418.315(1).[2] The Workers' Compensation Appellate Commission (WCAC) affirmed.

The Court of Appeals initially denied leave to appeal, but this Court remanded for consideration as on leave granted on the division of defendants' liabilities and the assessment of attorney fees. 477 Mich 871 (2006). On remand, the Court of Appeals affirmed the WCAC's imposition of liability against certain defendants, and that issue is not the subject of this appeal. The Court of Appeals also affirmed the WCAC's assessment of attorney fees against defendants. Unpublished opinion per curiam of the Court of Appeals, issued April 17, 2008 (Docket Nos. 273293 and 273294). The majority determined that attorney fees could be imposed on employers and their insurers under § 315(1), while Judge ZAHRA, in dissent, concluded that § 315(1) did not allow such imposition. This Court granted leave to appeal to consider the meaning of § 315(1), 482 Mich 994 (2008), and now affirms the Court of Appeals. Because I believe the Court of Appeals dissent is correct, I dissent.

II. STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *Brackett v Focus Hope, Inc*, 482 Mich 269, 275; 753 NW2d 207 (2008).

III. STATUTE

MCL 418.315(1) provides, in part:

[2] Defendants are various business entities that were either found to be plaintiff's "employer" for purposes of the WDCA or else liable for those payments as insurers.

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed . . . The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate.[3] The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

The instant dispute centers on the meaning of the final sentence, specifically what it means for the magistrate to be allowed to "prorate attorney fees." Plaintiff contends, and a majority of this Court agrees, that this sentence allows a magistrate, when granting a recovery under the penultimate sentence, to order the employer to pay, in addition to the amount awarded for reimbursement of unpaid medical expenses, the employee's attorney fees attributable to the unpaid benefits.[4] Defendants, however, argue that the final sentence allows

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[3] Presumably, if the employee has not paid the reasonable expenses for "medical, surgical, and hospital services," then the medical providers of those services are the "persons to whom the unpaid expenses may be owing."

[4] Under this approach, if the magistrate ordered the employer to pay either the employee or a medical provider $2,000 for unpaid expenses, the magistrate could also order the employer to pay the employee's attorney fees for the contingency fee on that amount. Assuming a 30% contingency fee, the employer would pay $2,600 total, with $2,000 paid to the employee or medical provider and $600 paid to the employee's attorney.

a magistrate, when ordering an employer to pay unpaid medical expenses to "persons to whom the unpaid expenses may be owing," to deduct a proportionate share from those payments for the employee's attorney fees.[5]

The primary goal of statutory interpretation is to discern and give effect to the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). A court first looks at the statute's language, *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007), from which "the Legislature's intent must be gathered," *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998) (quotation marks omitted). When reviewing the statute, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and "a word or phrase is given meaning by its context or setting,"[6] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002).

I agree with the Court of Appeals dissent, and with defendants, that the better interpretation of § 315(1)'s final sentence is that a magistrate can apportion an amount of the employee's attorney fees from an employer's payment to the medical care providers. This interpretation rests principally on the meaning of "prorate," which means "to divide, distribute, or calculate proportionately." *Random House Webster's College Dictionary* (1997). Thus, the final sentence can be read to allow the

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[5] Under this approach, if the magistrate ordered the employer to pay a medical provider $2,000 for unpaid expenses, the magistrate would apportion an amount based on the employee's contingency fee from that payment to go towards the employee's attorney fees. Assuming a 30% contingency fee, the employer would pay $2,000, with $600 paid to the employee's attorney and $1,400 paid to the medical provider.

[6] "It is only, therefore, within a context that a word, any word, can communicate an idea." *Leach v FDIC*, 860 F2d 1266, 1270 (CA 5, 1988).

magistrate to either divide or distribute proportionately attorney fees. That the division or distribution must be proportionate necessarily implies that there must be some *basis*, or rational calculation, upon which the total amount of attorney fees can be divided or distributed. This basis becomes increasingly apparent when § 315(1)'s final sentence is considered with the previous sentence, in which the magistrate is directed to order the employer to make "payment . . . in behalf of the employee to persons to whom the unpaid expenses may be owing." Thus, payments will be made to medical providers in the amount of the unpaid expenses owed by the employee. These payments logically supply the basis upon which the attorney fees can be proportionately divided, because each payment constitutes a portion of the whole on which the employee's attorney fees are calculated.[7] That is, if the magistrate orders payment to multiple medical providers, then a share of the employee's attorney fees is deducted from each payment based on the proportion of the whole that each payment represents.

The Legislature's use of the word "may" to confer upon the magistrate the authority to "prorate attorney fees" lends further support to this interpretation. By this word choice, the Legislature has indicated that there are times when a magistrate might *not* "prorate attorney fees." If "prorate" is interpreted to allow a division of fees between medical care providers, then the use of "may" in this context makes sense. In those

[7] This interpretation reflects the common understanding of the term "prorate" as often used, for example, in rental arrangements. A landlord will often "prorate" the tenant's rent when the lease does not begin on the first of the month. The tenant pays a prorated amount of the monthly rent based on the number of days (out of the whole month) that the tenant will be living in the apartment before the beginning of the next month.

instances that the magistrate directs payment to the medical providers, the magistrate *would* divide the fees, but when the magistrate only ordered reimbursement to the employee for his or her "reasonable expenses paid," the magistrate would not divide the fees. Thus, the final sentence recognizes that under the penultimate sentence the magistrate may direct payment either to the employee, in which case the division of attorney fees would be inappropriate, or the magistrate may direct payment to multiple medical care providers, or to the employee and medical care providers, in which case division of the attorney fees would be appropriate.

By contrast, the majority interpretation of § 315(1)'s final sentence allows a magistrate to impose attorney fees against the employer, in addition to the payment for unpaid medical expenses, with utterly no direction concerning the circumstances in which the magistrate should do so. That is, the majority interpretation accords the magistrate the *discretion* to assess attorney fees against an employer when the employer "fails, neglects, or refuses" to pay benefits, but provides no guidance for ascertaining when that discretion should or should not be exercised. Had the Legislature truly intended for the magistrate to impose attorney fees against an employer, it seems likely that the Legislature would have included *some* standard for determining the circumstances under which fees should be assessed.[8]

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[8] The Chief Justice asserts that giving the magistrate such standardless discretion is supported by "[o]ther provisions of the WDCA that vest discretion in magistrates using the word 'may' . . . ." *Ante* at 309 n 19. Contrary to her assertion, however, those other provisions do not similarly vest in a magistrate standardless discretion; rather, they provide at least some specific *direction* by which the magistrate is to exercise his discretion. With regard to the final sentence of § 315(1), this dissent finds that direction in the penultimate sentence of § 315(1); by contrast, the Chief Justice finds the penultimate sentence to be irrelevant to her analysis.

Even more troubling is that the Chief Justice apparently finds the entire final sentence of § 315(1) irrelevant in concluding that a magistrate can impose attorney fees against an employer. She states:

> [T]he word "may" bears on whether a proration must occur if a magistrate does award attorney fees. . . . Should a magistrate determine that only one [party] is liable, the magistrate may impose attorney fees against only that party. Conversely, should the magistrate find multiple parties liable, fees may be prorated accordingly. [*Ante* at 310.]

Thus, the Chief Justice interprets § 315(1) to allow a magistrate to impose attorney fees absent any "proration" of the fees because she interprets "may" as according the magistrate the discretion to decide "whether a proration must occur," *after he has already decided to award attorney fees*. If the magistrate determines that the attorney fees should be imposed on "multiple parties," then the magistrate can "prorate" or divide the fees among those parties. However, if "only one [party] is liable," the magistrate can impose the fees "against only that party" without having to "prorate" or divide the fees at all. This completely fails to recognize that § 315(1) only allows the magistrate to "prorate" or not "prorate" attorney fees. Interpreting § 315(1) to allow the magistrate to impose attorney fees without relying on the specific authority to "prorate" reads an authorization into the statute that clearly does not exist.

The Chief Justice supports her interpretation by reasoning that because the "statute . . . provides a process for employers and their insurance carriers to object to the medical treatment that an injured employee seeks," the final sentence "when read with the remainder of the statute, applies to the parties who might contest the payment of medical benefits: employers and their insurance carriers." *Ante* at 309. That is, to

"harmonize[] the final sentence with the remainder of § 315," and to avoid the final sentence "stand[ing] alone," § 315(1)'s final sentence must be read to impose additional liability on employers and their insurers, in order to maintain a "unity of purpose." *Ante* at 308-309, 336; see also *ante* at 342 (HATHAWAY, J., concurring). Contradicting this pursuit of "harmony" and "unity," however, are fundamental differences between § 315(1)'s final sentence and the preceding sentences, which clearly establish an employer's liability for *particular* expenses. In these preceding sentences, the Legislature states that the employer "shall furnish, or cause to be furnished," various reasonable medical expenses and that the employer "shall also supply" various correctional devices (e.g., eyeglasses, artificial limbs, crutches). MCL 418.315(1). If the employee pays these reasonable expenses, then under the penultimate sentence the employee "shall be reimbursed" for the reasonable expense paid by the employee. *Id.* Thus, the penultimate sentence relates back to the listed expenses that an employer "shall" pay. Attorney fees are not included in those expenses; yet the majority interpretation effectively gives the phrase "may prorate" the same meaning as the phrases "shall furnish" and "shall supply" so that the final sentence imposes an additional payment obligation upon the employer. This conclusion is contrary to the logical assumption that, had the Legislature intended to affirmatively impose payment of attorney fees upon an employer, it would have done so with at least approximately the same clarity with which it imposed liability for other expenses upon the employer earlier within the same subsection.[9] Instead, the Legis-

[9] Indeed, the Legislature has been fairly consistent throughout the WDCA when it imposes liability against the employer. For example, MCL 418.301(1) states that an employee "*shall be paid* compensation as provided in this act"; MCL 418.345 states that "the employer *shall pay*, or cause to be paid,

lature chose to use considerably different language in the final sentence than in the immediately preceding sentences.[10]

The final sentence is much better read, in my judgment, as an adjunct to the magistrate's ability to direct payment to medical providers established in the penultimate sentence. The legislative amendment adding the final sentence to § 315(1) specifically supports such a relationship. Before this amendment, the then-final sentence of former MCL 412.4, which is now § 315(1)'s penultimate sentence, only allowed the *employee* to receive payment for medical expenses:

> If the employer shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission. [MCL 412.4, as amended by 1955 PA 250.]

When the Legislature amended the statute to allow payment to also be directed to the medical providers, it added the now-final sentence in dispute here:

> If the employer shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expense paid by him, or payment may be made in behalf of such employee to persons to whom such unpaid expenses may be owing, by an award of the commission. The commission may prorate attorney fees in such cases at the contingent fee rate paid by such employee and it may also prorate such payments in the event of redemptions. [MCL 412.4, as amended by 1963 PA 199.]

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the reasonable expense of the employee's last sickness, funeral, and burial"; and MCL 418.351(1) states that "the employer *shall pay*" weekly compensation when the employee is totally incapacitated from work. (Emphasis added.)

[10] Although the Chief Justice and Justice HATHAWAY purport to "read [§ 315(1)'s final sentence] with the remainder of the statute," *ante* at 309 and *ante* at 342 (HATHAWAY, J. concurring), both fail to even give consideration to the language in the immediately preceding sentence.

Thus, the magistrate's ability to "prorate attorney fees" directly accompanied the magistrate's ability to direct payments to medical providers.[11] This association seems to indicate that the Legislature recognized that when medical providers received payment from the employer, the medical providers themselves could fairly be said to have been enriched by the work of the employee's attorney.

Prior to the amendment, a medical provider was relegated to seeking payment from the employee through a separate cause of action. Even if the medical providers recovered the full amount in the action, each would still have to pay its own attorney costs due to the longstanding "American Rule" regarding attorney fees.[12] In effect, the Legislature set forth a shortcut to

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[11] Recognizing that "not all legislative history is of equal value," *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), this amendment of the statute constitutes the legislative action that established the present relationship between § 315(1)'s penultimate and final sentences that can be gleaned from the sentences themselves. See *supra* at 354-355. As such, the *fact* of this amendment represents what is clearly the most compelling form of legislative history, because it is derived purely from the enacted words of the statute. On the other hand, relying on legislative history based upon a legislative analysis, see, e.g., *Adrian School Dist v Michigan Pub School Employees' Retirement Sys*, 458 Mich 326, 335; 582 NW2d 767 (1998) (KELLY, J.); *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 315 n 12; 596 NW2d 591 (1999) (KELLY, J.), created by staff offices within the Legislature is significantly less compelling, *In re Certified Question*, 468 Mich at 115 n 5, and legislative history that relies exclusively upon the statements of a single one of 110 members of the House of Representatives, or a single one of 38 members of the state Senate, is even less compelling.

[12] In *Haliw v Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005), we stated:

> Michigan follows the "American rule" with respect to the payment of attorney fees and costs. Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. [Citation omitted.]

this practice in § 315(1). Rather than requiring medical providers to hire their own attorneys and commence separate actions against the employee, § 315(1) now allows the medical provider to recover through the action instituted by the employee.[13] Medical providers receive the same reimbursement amount as they did before the amendment, while employees retain more of the recovery to which they are entitled.[14]

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[13] This is similar to the arrangement provided by § 821(2), which allows an employee to assign a portion of his workers' compensation award to an insurance company, health maintenance organization, or medical care and hospital service corporation that makes an advance or payment to the employee under an insurance policy that provides that benefits are not payable for workers' compensation injuries. Upon enforcement of that assignment, the insurance company, health maintenance organization, or medical care and hospital service corporation shall pay "a portion of the attorney fees of the attorney who secured the worker's compensation recovery." MCL 418.821(2). Thus, the employee retains an attorney to recover benefits, and the recovery subject to the assignment helps pay the employee's attorney fees.

Likewise, pursuant to § 827, a nonparty employer can recover through the efforts of an employee's attorney pursuing a third-party liability action, whereby an employee can seek recovery for the same damages he "would be entitled to recover in an action in tort." MCL 418.827(5). If the employee recovers, then he shall first "reimburse the employer or carrier for any amounts paid or payable" under the WDCA, reduced by "expenses of recovery," *id*., which include "reasonable expenditures, including attorney fees, incurred in effecting recovery," MCL 418.827(6). Thus, the employer does not recover the full amount it paid under its workers' compensation policy. Rather, the full amount is less any attorney fees, which the employer would have had to pay had it sued the third party for recovery as it is entitled to do. MCL 418.827(1) (employer can bring suit against third party in name of employee if one year has passed since the employee's injury). This reduction of the recovery amount is the same as when a magistrate "prorates" pursuant to § 315(1)'s final sentence.

[14] The financial outcome for medical providers remains the same, whereas, by eliminating the need for providers to hire attorneys, the employee actually keeps more of his medical expenses. For example, assume that an employee has paid $3,000 in medical expenses provided

The majority interpretation would impose an additional cost upon the workers' compensation process by penalizing employers and forcing them to pay not only for their own attorneys, but also for their employees' attorneys. This increased expense is at odds with MCL 418.801(3), in which the Legislature has *already* provided a penalty for unpaid medical benefits:

> If medical bills or travel allowance are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, in cases where there is no ongoing dispute, $50.00 or the amount of the bill due, whichever is less, shall be added and paid to the worker for each day over 30 days in which the medical bills or travel allowance are not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

The majority interpretation would establish a new penalty provision with § 315(1)'s final sentence that is

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for in § 315(1) and still owes a medical provider $2,000 for such expenses. Further assume that attorney fees are 30% of any recovery. Prior to the addition of § 315(1)'s final sentence, an employee would seek recovery of $5,000 from the employer and, upon receiving that amount, would owe his attorney $1,500. After the medical provider commenced an action for the $2,000 and obtained a judgment for that amount, the employee would be left with $1,500, half of what he paid. The medical provider would owe its attorney $600, meaning that the medical provider recovered $1,400 for its $2,000 bill. Thus, the employee retained $1,500, the medical provider retained $1,400, and the attorneys (employee's and medical provider's) went home with $2,100. On the other hand, after the addition of § 315(1)'s final sentence as interpreted in this dissent, the magistrate would direct payment of $2,000 to the medical provider but with $600 appropriated for the employee's attorney. The magistrate would also direct payment of $3,000 to the employee but with $900 appropriated for the employee's attorney. As a result, the medical provider recovers the same amount that it would have recovered in a separate action against the employee, but the employee is left with $2,100, which is $600 more than he would have recovered under the old system. The $600 is available because the Legislature provided a way in which recovery could be realized by both the employee and the medical provider without requiring both to hire their own attorneys.

inconsistent with the WDCA's actual penalty provision, in which the Legislature expressly provides for a penalty payment only "where there is no ongoing dispute." Nothing in the majority interpretation prevents the attorney-fees penalty from operating even in the presence of a dispute, which is directly contrary to when the Legislature has stated a penalty should apply. If the Legislature intended § 315(1) to operate as a penalty provision, then it would seem that such penalty would at least be assessed consistently with the penalty provided under § 801(3). This lack of consistency casts further doubt on the majority interpretation.

With respect to the magistrate's authority over medical providers that are not parties to the action, § 315(2) implies that the magistrate indeed does have authority over medical providers when they are operating in the context of § 315 by providing that any recovery by a medical provider can be reduced by the magistrate to the "maximum charge established *under the rules*." (Emphasis added.) Thus, the magistrate may reduce the provider's recovery even if the provider is not a party to the action. It follows that the magistrate has the same ability to reduce the recovery to pay for an employee's attorney fees when the statute grants the magistrate such authority in § 315(1).[15]

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[15] I also respectfully disagree with Justice YOUNG's interpretation that § 315(1) "permit[s] the magistrate to prorate attorney fees between the claimant and the employer . . . ." *Ante* at 343. First, he does not account for why the magistrate's authority to "prorate attorney fees" is only triggered "[w]hen an employer unjustifiably refuses to fulfill its statutory duty to pay for medical expenses . . . ." *Ante* at 344. It would seem more logical under his interpretation that a magistrate could impose attorney fees against an employer *any time* the employer "fails, neglects, or refuses" to pay for the medical expenses. Nowhere does the statute include the caveat that the refusal must be "unjustified" before the magistrate can "prorate" the fees. Second, the statute directs proration "at the contingent fee rate paid by the employee," MCL 418.315(1), not

In conclusion, several clues supplied by § 315(1) and the WDCA support the interpretation set forth in this dissent. Particularly relevant in this regard are: (1) the use of "prorate," the proportionality of the division this term conveys, and the fact that there is some logical standard or basis for calculating proportions under this interpretation, but not under the majority interpretation; (2) the use of "may" in describing the magistrate's authority to prorate, and the fact that there is some logical standard or basis for exercising this authority under this interpretation, but not under the majority interpretation; (3) the consistency of this interpretation, and the lack of consistency of the majority interpretation, with the penalty provision in § 801(3); (4) the fact that the majority interpretation reads words into § 315(1) that are absent and nullifies words that are present; (5) the significant differences in language between the introductory sentences of § 315(1), which clearly establish an employer's liability for particular expenses, and its final sentence, which does nothing equivalent; (6) the logical implications drawn from § 315(1)'s final sentence being positioned after the penultimate sentence, and the legislative amendment of § 315(1); and (7) the similarity in the arrangement between employees' attorneys and medical providers

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"according to the respective merits of [the parties'] positions," *ante* at 344. Third, the penultimate sentence "provides two options"—the magistrate can direct payment to the employee or to medical providers—and Justice YOUNG, in my judgment, fails to recognize that these options provide an obvious statutory basis upon which the magistrate can exercise his discretion to "prorate attorney fees." Finally, although medical providers are, in fact, "entitled to the entirety of their fees" before litigation, *ante* at 346 n 4, the reality is that a recovery will always be subject to attorney fees. Rather than "impos[ing]" fees against the providers, the Legislature created a mechanism whereby the fees are simply deducted from the recovery being paid to the provider, and whereby the number of "parties to the litigation" can be reduced, without affecting the outcome to those potential parties.

set forth in this dissent and the arrangement between employees' attorneys and nonparties set forth in §§ 821 and 827.

IV. RESPONSE TO THE CHIEF JUSTICE

Not content with merely misconstruing the law, the Chief Justice adopts an approach to statutory interpretation that can only be described as bizarre. She *begins* her interpretation by asserting that the "threshold question is whether . . . the last sentence of § 315(1) is ambiguous." *Ante* at 308.[16] After an entirely gratuitous citation to the dictionary definition of "prorate," one that promptly proves to be irrelevant to any subsequent analysis, the Chief Justice determines that "the term 'prorate' could reasonably apply to employers, their insurance carriers, health care providers, employees seeking workers' compensation benefits, or to any combination of them." *Ante* at 308. This finding should come as no surprise considering the Chief Justice's focus on the word "prorate" without regard to its context. Next, the Chief Justice initially determines that "neither § 315 as a whole nor any other provision of the WDCA indicates the parties to whom a division or distribution of attorney fees applies," but nevertheless proceeds to adopt her own interpretation because it "unifies the last sentence of § 315(1) with the remainder of the statute." *Ante* at 308-309. Satisfied that her interpretation also gives effect to the word "may," cf. *supra* at 356, the Chief Justice then concludes that her interpretation "affords the phrase 'may prorate' its full meaning." *Ante* at 310. After all of this, the Chief Justice continues to answer her "threshold question" in the affirmative, concluding that the statute is ambiguous

[16] I note that this approach has not garnered majority support on this Court.

because other "interpretations of § 315(1) exist." *Ante* at 310. That is, rather than even giving the *appearance* that she has reached the conclusion that the statute is "ambiguous" based upon her difficulty in ascertaining its meaning, the Chief Justice withdraws from the process of statutory interpretation once other interpretations are presented. It is apparently much easier to summarily declare "ambiguity," and thereby avoid the inconvenience of having to actually carry out one's judicial duties by deciding what the statute or contract actually states.[17]

A. AMBIGUITY

As evident from her "interpretation" here, the Chief Justice's dependence on an extraordinarily low threshold for finding ambiguity, and her resultant conclusion that § 315(1) is, of course, "ambiguous," are essential to her analysis. The Chief Justice then proceeds on the assumption that, once ambiguity has been established, a judge is essentially unencumbered by any serious restraints imposed by the language of a statute or contract and effectively has carte blanche to utilize whatever factors are deemed appropriate in reaching a result.

I disagree with this approach to "interpretation," not merely because it divorces the interpretative process from the law that is purportedly being "interpreted," but also because it raises the unavoidable suspicion that

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[17] Because interpreting either statutes or contracts requires a court to give meaning to specific language, the interpretative approach signaled by a particular view of ambiguity "applies with equal force whether the court is interpreting a statutory text or a contractual one." *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 165 n 6; 680 NW2d 840 (2004). See also *Ellis v Farm Bureau Ins Co*, 482 Mich 1119, 1120-1121 (2008); *Zahn v Kroger of Michigan*, 483 Mich 34, 40 n 8; 764 NW2d 207 (2009).

a judge is reaching the result he or she would *personally* prefer rather than the result compelled by the law. That is, instead of abiding by the traditional exercise of the "judicial power" in which the judge, employing the statute or contract itself as the lodestar, says only what the law "is," the Chief Justice by her understanding of ambiguity would effectively exercise the "legislative power" to say what the law "ought to be" by arbitrarily picking and choosing among a practically limitless variety of available extra-textual considerations.[18] For the Chief Justice, the concept of ambiguity is one to be both casually and peremptorily invoked—as in this case in which no party has even asserted that the statute is ambiguous—to avoid the discipline of the traditional judicial process, while maintaining at least some appearance that this process has been respected. The lower the barrier to finding ambiguity, the more effortlessly a judge can dispense with the hard work of giving meaning to difficult and complex provisions of statutes and contracts, and the less risk that this regular process of interpretation will lead to the "wrong" results. A facile resort to ambiguity affords the judge a readily available means of acting beyond the scope of his or her authority to exercise exclusively the "judicial power."

It is hard to conceive of a much lower barrier to ambiguity than that propounded by the Chief Justice. A statute, we are instructed, is "ambiguous" when it is "capable of being understood by reasonably well-

[18] When deciding a case, the judiciary's role is, and has always been, to answer the question, "what is the law, and not what ought the law to be." *Detroit v Blackeby*, 21 Mich 84, 118 (1870) (COOLEY, J., dissenting); see also *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 397; 630 NW2d 297 (2001) (MARKMAN, J., concurring), citing *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803). "It is for the court to declare what the law is—not to make it." *Wilson v Arnold*, 5 Mich 98, 104 (1858).

informed persons in two or more different senses."[19] *Ante* at 331. If this definition does not describe almost *all* litigation coming before this Court, it certainly describes *much* of this litigation. There are relatively few appellate litigants—most of whom have undertaken the financial burdens of litigation, accepted the psychological and emotional tolls of a protracted legal process, and endured trial, intermediate appeal, Supreme Court appeal, remands, and motions for reconsideration, all while being represented by attorneys who are ethically obligated to ensure some degree of meritoriousness in their clients' legal positions—whose statutory and contractual disputes could not be fairly characterized under the Chief Justice's definition as entailing ambiguity. Indeed, little would be clearly *excluded* from the realm of ambiguity by her definition other than genuinely frivolous lawsuits, which are both rare and sanctionable. Matters of interpretation are resolved in judicial venues precisely because statutes and contracts are

[19] The Chief Justice also states that a statute is ambiguous when "two persons reasonably afford [a] different meaning[ ]" to it, or when it is "of questionable or unclear meaning." *Ante* at 328. She has previously opined that a statute is ambiguous "when its application to the facts of the case is uncertain," *DaimlerChrysler Corp v State Tax Comm*, 482 Mich 220, 240 n 2; 753 NW2d 605 (2008) (KELLY, J., concurring in the result), or when "there can be reasonable disagreement over its meaning," *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 186; 730 NW2d 722 (2007) (KELLY, J., concurring). As with her latest definition of ambiguity in this case, what would be truly remarkable about *any* of these definitions would be if they served to *exclude* many statutory or contractual disputes from their purview. "Uncertainty" and "disagreement" are what draw parties into litigation in the first place. See also *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 95 n 34; 748 NW2d 524 (2008) (KELLY, J., dissenting), in which the Chief Justice asserted that a general provision of Michigan's constitution was "ambiguous" because it did not expressly set forth every specific circumstance to which it was applicable. The majority responded, "If that were the case, almost all constitutional provisions would be rendered ambiguous." *Id.* at 81 n 21.

susceptible to "being understood by reasonably well-informed persons in two or more different senses."

Even more remarkable, however, is that the Chief Justice's own "analysis" in this case does not even satisfy her own low threshold for discerning ambiguity, since there is nothing therein that suggests that *either* the plaintiff's or the defendants' position is "reasonable." In fact, the Chief Justice never once compares *any* interpretation other than her own to the statute. She simply notes the "exist[ence]" of competing interpretations and declares ambiguity. *Ante* at 310. Essentially, the Chief Justice's standard for discerning ambiguity is more accurately stated as: "A statute is ambiguous when parties offer conflicting interpretations."[20]

The Chief Justice has previously observed, "I find frequent ambiguity in statutory language." *Haynes v Neshewat*, 477 Mich 29, 40; 729 NW2d 488 (2007) (KELLY, J., concurring).[21] This is not surprising. For once

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[20] Such disagreement between parties is hardly a precedent-shattering event in this Court.

[21] At least in this regard, she is unquestionably correct. See, for example, the following list of cases enumerated in footnote 56 of the Chief Justice's opinion to get some sense of the breadth of the matters that she apparently views as "ambiguous" among our published opinions over the past five years alone. With regard to each of these "examples," the dissenting justices in this case are implicitly chastised for having "declined" to find ambiguity:

> See, e.g., *Dimmit & Owens Fin, Inc v Deloitte & Touche*, 481 Mich 618; 752 NW2d 37 (2008); *Ross v Blue Care Network*, 480 Mich 153; 747 NW2d 828 (2008); *Wesche v Mecosta Co Rd Comm*, 480 Mich 75; 746 NW2d 847 (2008); *Ernsting v Ave Maria College*, 480 Mich 985 (2007); *Trentadue* [*v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007)]; *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007); *Brown* [*v Detroit Mayor*, 478 Mich 589; 734 NW2d 514 (2007)]; *Renny v Dep't of Transportation*, 478 Mich 490; 734 NW2d 518 (2007); *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518; 734 NW2d 533 (2007); *Omdahl v West*

a statute or contract has been deemed "ambiguous," this Court "may go beyond the plain language of the statute [or contract]," *ante* at 307-308, and then employ decision-making factors that would ordinarily be unavailable in the interpretative process. There is no lack of variety in these newly available factors. As I offered in my concurring opinion in *Haynes*:

> Having reached the proper result in this case through a proper legal analysis, Justice KELLY in a concurrence to her own majority opinion proceeds to demonstrate that she

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Iron Co Bd of Ed, 478 Mich 423; 733 NW2d 380 (2007); *Bukowski v Detroit*, 478 Mich 268; 732 NW2d 75 (2007); *Karaczewski* [*v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007)]; *Fluor* [*Enterprises, Inc v Dep't of Treasury*, 477 Mich 170; 730 NW2d 722 (2007)]; *Rowland* [*v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007)]; *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006); *Paige* [*v Sterling Hts*, 476 Mich 495; 720 NW2d 219 (2006)]; *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006); *Ford Motor Co v Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006); *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006); *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006); *People v Yamat*, 475 Mich 49; 714 NW2d 335 (2006); *Grimes* [*v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006)]; *Michigan v Monaco*, 474 Mich 48; 710 NW2d 46 (2006); *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36; 709 NW2d 589 (2006); *Co Rd Ass'n v Governor*, 474 Mich 11; 705 NW2d 680 (2005); *Devillers* [*v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005)]; *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005); *Ayar v Foodland Distributors*, 472 Mich 713; 698 NW2d 875 (2005); *Casco Twp* [*v Secretary of State*, 472 Mich 566; 701 NW2d 102 (2005)]; *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005); *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207; 696 NW2d 621 (2005); *Roberts v Atkins*, 470 Mich 679; 684 NW2d 711 (2004); *Neal* [*v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004)]; *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004); [*People v*] *Lively*, [470 Mich 248; 680 NW2d 878 (2004)]; *People v Laney*, 470 Mich 267; 680 NW2d 888 (2004); *Lansing Mayor* [*v Pub Service Comm*, 470 Mich 154; 680 NW2d 840 (2004)].

It should be clearly understood that in each of these cases, as well as in all other cases in which ambiguity is found, justice under the *law* would be replaced by the personal "justice" of the men and women who comprise the Court's majority. This is the "rule of men [and women]," not the rule of law.

> could have reached the same result through less disciplined means. Not content to rely, as she does in her majority opinion, on the actual language of the law, Justice KELLY invokes an array of alternative techniques to "interpret" the law in her concurring opinion. She relies upon a "liberal construction" of the statute in question; she relies upon characterizations of the statute as "broad" and "remedial"; she relies upon a summary description of the law as "ambiguous," therefore apparently affording her the discretion to pick and choose the law she prefers; she relies upon the Legislature's inaction in the wake of an earlier court decision, equating this to approval of the Court's decision; she disparages the value of dictionaries as an essential tool in the interpretative process; and she relies upon an extraordinarily broad understanding of "legislative history." For the sake of future reference, a further catalogue of language-avoidance "interpretative" techniques would include the following: divining the "spirit of a statute"; relying upon considerations of "public policy"; standardlessly applying "equity"; characterizing statutes with which a judge disagrees as "absurd"; and concocting creative "balancing" and "totality of circumstances" tests. Innovatively applied, each of these techniques can be relied upon to avoid the hard task of having to discern a statute's meaning from its actual language. [*Haynes*, 477 Mich at 48-49 (MARKMAN, J., concurring).]

The use of these and other factors to reach a decision far more closely resembles the exercise of the constitution's "legislative power" than its "judicial power." It is an undisciplined and standardless approach to giving meaning to the law, enabling the judge at his or her discretion to determine which factors to take into account, and what priority to give those factors.[22] It is

[22] "It is only by interpretations of the law that are in accord with the words of the lawmaker—that is, interpretations in which judges look *outside* themselves for a source of law—that the decisions of courts are truly removed from the realm of politics and policymaking." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 761; 641 NW2d 567 (2002).

an approach that disrespects the separation of powers[23] and that enhances the power of judges at the expense of the rule of law.[24]

B. DISSENT AND AMBIGUITY

The Chief Justice's definition of ambiguity stands in contrast to what has been the predominant approach in our state. In *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), this Court stated that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." (Citation omitted.) Similarly, in *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), this Court found a contract to be ambiguous because two provisions "irreconcilably conflict[ed]" with each other.[25] Such an understanding of ambiguity restricts the judge

[23] "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2.

[24] "[I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are." *Robinson v Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000).

[25] In her assertion that this Court "has declined [during a four-year period] to find any statutory language ambiguous," *ante* at 311 n 23, the Chief Justice fails to mention that this Court found the contract in *Klapp* itself to be ambiguous and then resolved this ambiguity by the application of the traditional rule *contra proferentem* (resolving a contract dispute against its drafter). See also *Stone v Williamson*, 482 Mich 144, 157; 753 NW2d 106 (2008). Perhaps more to the point, however, it is odd that the Chief Justice would make a *virtue* of a judge quickly throwing up his or her hands in the face of even a slightly difficult statute and dispensing with his or her obligation to say what the law means, while making a *vice* of a judge laboring hard to determine what even a highly difficult statute means in order to ensure that the legislative decisions of the people's representatives are respected.

to saying what the law "is" based on the words chosen by the Legislature in all but the most extraordinary circumstances. While the Chief Justice suggests that the relative rarity of a finding that a law or contract is ambiguous under this definition constitutes its vice, *ante* at 322-323, by preserving a broader realm within which the ordinary process of interpretation may proceed, and in which deference will be shown to the decisions of the lawmaker, this may be better understood as its principal virtue.

Many disputes before this Court involve difficult or complex interpretations of statutes and contracts, yet it remains our responsibility to sort out these difficulties and complexities and finally determine what constitutes the *most reasonable*, if not always the perfect or the crystalline, meaning of the law. Judges have traditionally approached this responsibility by looking to the language of a statute or contract, considering relevant dictionary definitions of words and phrases,[26] assessing the existence and meanings of "terms of art,"[27] evaluating the context of words[28] and grammatical, syntactical, and punctuational clues,[29] comparing related and companion provisions of the law,[30] discerning the organization

[26] See *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) (stating that a court "may consult dictionary definitions" to help ascertain the meaning of terms not defined in the statute).

[27] "It is a cardinal rule in the interpretation of statutes that words which have acquired a well-defined technical meaning, are to be understood in their technical sense . . . ." *Pitcher v People*, 16 Mich 142, 147 (1867); see also MCL 8.3a.

[28] "[A] word or phrase is given meaning by its context or setting." *Tyler v Livonia Pub Schools*, 459 Mich 382, 391; 590 NW2d 560 (1999).

[29] See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (stating that "statutory language must be read and understood in its grammatical context").

[30] "[I]n the interpretation of the statutes, we are to take into view all such parts as relate to the same subject." *Malonny v Mahar*, 1 Mich 26, 28 (1847).

and structure of statutes and contracts,[31] invoking traditional default rules and maxims of interpretation,[32] and applying proper understandings of legal purpose and precedent.[33]

This should not be understood as a mechanical process, for judges engaged conscientiously in this exercise will sometimes disagree about the meaning of the law, but it is a process in which the focus is directed *outwardly* toward the language of the statute or contract, rather than *inwardly* toward the personal predilections of the judge.[34] As Justice Felix Frankfurter once

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[31] See *Lash v Traverse City*, 479 Mich 180, 190; 735 NW2d 628 (2007) (rejecting an argument regarding the statute's purported purpose as being "completely contrary to the structure of the statute").

[32] See, e.g., *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006) ("[W]here a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls.").

[33] See *Pohutski v City of Allen Park*, 465 Mich 675, 694; 641 NW2d 219 (2002) (emphasizing that a crucial aspect to the proper understanding of precedent is that it "should not be applied mechanically to prevent this Court from overruling erroneous decisions regarding the meaning of a statute").

[34] The Chief Justice disparages this approach by stating that a " 'plain meaning' approach to statutory interpretation is equally susceptible to subjective and arbitrary determinations of legislative intent" because "such an approach may lead to the selection of one dictionary definition among many for a specific term." *Ante* at 313 n 35. The Chief Justice thus damns the very enterprise of judging by suggesting that it can never be anything other than "subjective" and "arbitrary," for words may sometimes have multiple meanings. The Chief Justice then defends her own approach to the judicial role by effectively declaring that all interpretation is nothing but a fiction in which the judge, one way or another, gets to impose his own personal will. That is, since interpretations of the law can sometimes be difficult, and may entail the application of judgment and discernment, a "plain meaning" approach to interpretation (a characterization incidentally never used by any of the justices dissenting in this case) has no superior stature to a post-ambiguity approach to interpretation in which words are given no respect whatsoever. By equating the imperfections inherent in a human process in which language is taken seriously with the fundamental defects inherent in a

remarked, "the highest exercise of judicial duty is to subordinate one's personal will and one's private views to the law."

C. PREMISES OF AMBIGUITY RULE

Despite the Chief Justice's view that an understanding of ambiguity does not constitute "binding precedent," she nonetheless undertakes a strenuous effort to identify precedents in support of her position, while

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process in which language is subordinate to a judge's personal sense of which results are to be preferred, it is hard to imagine a more mistaken, and cynical, view of the judicial enterprise, albeit one that encapsulates well the persistent constitutional and jurisprudential divide between the justices in the majority and the dissenting justices.

Concerning *Liberty Hill Housing Corp v City of Livonia*, 480 Mich 44, 57; 746 NW2d 282 (2008), which the Chief Justice cites as somehow exemplifying the defects of the "plain meaning" approach, this Court explained:

> The third, fourth, and fifth meanings in the definition are clearly not relevant here. The first meaning defines "occupy" as "to have, hold, . . . possess, . . . or claim[.]" These parts of the definition are synonymous with ownership. Because the statute uses the conjunctive term "owned *and* occupied," however, the Legislature must have intended different meanings for the words "owned" and "occupied." Otherwise, the word "occupied" would be mere surplusage.

See also *id.* at 57 n 12. Thus, *Liberty Hill* relied on the maxim that the Court should avoid rendering a portion of the statute nugatory or surplusage, i.e., the Court should give effect to *all* the words of the Legislature. Thus, contrary to the Chief Justice's assertion, *Liberty Hill* demonstrated that a responsible judge, attempting faithfully to give meaning to the law, does not have "unfettered discretion to pick and choose among available 'plain meanings,' " *ante* at 321, but rather is bound by existing rules, and by interpretative approaches, that are well-known both to the judge and the parties beforehand. While such an "interpretivist" or "textualist" approach cannot dispense entirely with the exercise of judgment, unlike the approach preferred by the Chief Justice, the interpretative "rules of the game" under the former approach will be known in advance and are designed to reasonably ascertain the intentions of the lawmaker.

undertaking no discernible effort to actually justify her own understanding. Rather than constituting an "aberrant" approach to interpretation, *ante* at 328 n 66, *Mayor of Lansing* and *Klapp* set forth a rule of statutory interpretation that, as with most other such rules, is grounded in logic and common sense, and is designed to faithfully ascertain the intentions of the Legislature. The understanding of ambiguity articulated in *Mayor of Lansing* and *Klapp* is premised upon longstanding principles of sound constitutional government that are suggested by the following inquiries directed toward those who would advocate a broader understanding:

> —When ambiguity is discerned, ordinary rules of interpretation no longer apply—as the Chief Justice asserts, a court may then "go beyond the plain language of a statute [or contract]"—and judges are accorded broad and arbitrary discretion to pick and choose from among a wide variety of factors as to how the law should be given meaning. Why would any responsible legal system wish to depart from its ordinary processes, from ordinary rules of interpretation and traditional exercises of the judicial power, with any greater frequency than is absolutely required?
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> —When ambiguity is discerned, ordinary rules of interpretation no longer apply—as the Chief Justice asserts, a court may then "go beyond the plain language of a statute [or contract]"—and judges are accorded broad and arbitrary discretion to pick and choose from among a wide variety of factors as to how the law should be given meaning. Why would any responsible legal system wish to replace a reasonably predictable rule of law with arbitrary, and possibly idiosyncratic, determinations of judges any more often than is absolutely required?
>
> —When ambiguity is discerned, ordinary rules of interpretation no longer apply—as the Chief Justice asserts, a court may then "go beyond the plain language of a statute [or contract]"—and judges are accorded broad and arbitrary discretion to pick and choose from among a wide

> variety of factors as to how the law should be given meaning. Why would any responsible legal system wish to minimize the realm in which judges are bound by the written law and instead maximize the realm in which written law is subrogated to a variety of indeterminate factors at a judge's disposal?
>
> —When ambiguity is discerned, ordinary rules of interpretation no longer apply—as the Chief Justice asserts, a court may then "go beyond the plain language of a statute [or contract]"—and judges are accorded broad and arbitrary discretion to pick and choose from among a wide variety of factors as to how the law should be given meaning. Why would any responsible legal system wish to instill in litigants and the public the idea that the personal preferences of a judge, rather than the requirements of the law, are what is most important to the resolution of a legal dispute?
>
> —When ambiguity is discerned, the "judicial power," the only power properly exercised by a judge under the Constitution, is exercised in a manner incompatible with its usual exercise—as the Chief Justice asserts, a court may then "go beyond the plain language of a statute [or contract]." Why would any responsible legal system wish to depart from traditional constitutional norms or to obscure the Constitution's separation of powers?

By contrast, what logical or other arguments does the *Chief Justice* have for substantially expanding the range of judicial decision-making within which courts "may go beyond the plain language of the statute [or contract]," and within which "it is the duty of the courts," instead of the lawmaker, to give a "reasonable and sensible" interpretation to the law? *Ante* at 307-308. What conceivable arguments does the *Chief Justice* have for favoring an expansion in the range of judicial decision-making within which judges are empowered to devise, at their discretion, *ad hoc* and unpredictable criteria for determining how the law will be defined? Hers is a hollow opinion, evidenced not only

by her failure to abide even by her *own* standards for identifying ambiguity, but also by her failure to articulate even a minimal justification for these standards.[35]

D. LOGIC OF AMBIGUITY RULE

The Chief Justice asserts that language is ambiguous when it is "capable of being understood by reasonably well-informed persons in two or more different senses," *ante* at 331, but she never supplies any explanation for how this definition is to operate practically in the real world. She fails to answer, or even ask, whether there is some *threshold* beyond which it can be said that an interpretation is "capable of being understood by reasonably well-informed persons in two or more different senses." Is it sufficient, for example, in finding ambiguity that 10% or 20% or 30% of all "reasonably well-informed persons" might subscribe to a particular interpretation? Indeed, is it sufficient that the parties merely disagree, or must the Court intervene to determine that the position of each side is itself reasonable?

Given that the *Mayor of Lansing*/*Klapp* standard can be quantified as a 50% test—i.e., if there are two equally reasonable interpretations, a law is ambiguous; otherwise it is not—how would the Chief Justice characterize *her* standard? What is the approximate threshold at which a law should be found ambiguous? Unless *any*

[35] The Chief Justice asserts that she need not justify her standard in light of the fact that other jurisdictions utilize similarly worded standards. *Ante* at 330-331 & nn 73-75. Whatever the relevance of this observation, one doubts that any of these variants have been applied in other jurisdictions in the wildly overreaching manner reflected by the instant decision, reflected by the breadth of potentially "ambiguous" cases cited at n 21 of this opinion, and reflected in the Chief Justice's own passion for finding "frequent ambiguity" in the law, *Haynes*, 477 Mich at 40 (KELLY, J., concurring).

disagreement by *any* single "reasonably well-informed person[]" would be sufficient to trigger a finding of ambiguity, where is this threshold point? If 90 percent of all "reasonably well-informed persons" believe that the proper interpretation of a statute is X, and 10 percent believe that it is Y, or if a judge is 90% persuaded that the more reasonable interpretation is X, and 10% persuaded that it is Y, is there ambiguity? Obviously, the Chief Justice's threshold for finding ambiguity falls somewhere below 50%, but approximately where? Are there any other areas of the law in which a judge, in the exercise of the judge's fundamental obligation to interpret the law, must subordinate his or her own judgment concerning the meaning of the law to that of "reasonably well-informed [other] persons," or to any other group of persons?

Given that the Chief Justice's threshold must necessarily be less than 50%, why should that level ever be deemed sufficient to allow a judge to dispense with the language of a statute or contract as the dispositive factor in determining its meaning? That is, if a judge is 51% or 61% or 71% persuaded that some interpretation of the law is the better, or the "most reasonable," interpretation, what is the rationale for allowing a judge to interpret the law in some different fashion? Why would a judge ever adopt an interpretation that he or she believes is the second-best, or the second most reasonable, interpretation? If *any* interpretation of the law, concerning which a judge is less than 100% certain —say a 95% certainty—will ever permit that judge to adopt such interpretation as the better, or the "most reasonable" interpretation, what is the reason why a 51% or 61% or 71% interpretation should *not* prevail over a 29% or 39% or 49% interpretation—much less with respect to what the Chief Justice describes as "more" interpretations that might be offered, see *ante*

at 329, none of which may draw their legitimacy from the words of a statute or contract? Why shouldn't the better, or the "most reasonable," interpretation always prevail? Absent a perfectly clear statute or contract, why should a judge not prefer the 51% or 61% or 71% interpretation? Why should a 29% or 39% interpretation ever be placed on par with a 71% or 61% interpretation? Indeed, why should a definition of ambiguity be adopted that allows a judge to determine that *neither* the 75% nor the 25% "most reasonable" interpretations will be adopted? *Ante* at 328-329. Why isn't it fair to conclude that the better, or the "most reasonable," interpretation—which may be the 51% interpretation—is simply the correct interpretation of the law?

The Chief Justice has little interest in parsing § 315(1), little interest in explaining why either of the parties' interpretations is "reasonable" or "unreasonable," and little interest in explaining why, in either constitutional or logical terms, her understanding of ambiguity makes sense, much less why it makes better sense than what *Mayor of Lansing* and *Klapp* have set forth. Instead, the Chief Justice is content to proceed, without explanation, upon her deconstruction of the law of Michigan.

E. NO PREVIOUSLY ESTABLISHED RULES

After her "analysis" of § 315(1)—one consuming nearly a full paragraph and in which a sideways glance at the sentence immediately preceding the one in dispute is apparently seen as excessively rigorous—the Chief Justice deems the statute "ambiguous," i.e., alternative interpretations could "reasonably apply." She then proceeds to select from among the available "interpretative" tools and adopt those that purportedly

support her result. Apparently, for every ambiguous statute or contract reaching this Court, and there will be many such statutes and contracts if the Chief Justice's position ever prevails, she will re-embark upon this "interpretative" process, picking and choosing at her discretion from among some uncertain array of tools lying "beyond the plain language of the statute [or contract]." See *Haynes*, 477 Mich at 48-49 (MARKMAN, J., concurring), for a partial listing of such tools. The litigants will, of course, have no notice beforehand of which tools are to be employed, for the justices themselves will not know this beforehand. Among the universe of potential tools extending "beyond the plain language of the statute [or contract]," the Chief Justice will, by some means never quite explained, determine which of these are deemed to be relevant in interpreting the statute or contract in that case, and after several turns and twists of the mechanisms of her own internal Enigma machine, some result will emerge. One result will emerge if the "relevant" legislative history, for example, is the Senate committee report, another result will emerge if the "relevant" legislative history is the House committee report. Still other results will emerge if the "relevant" legislative history is comprised of the statements of the Senate or House committee chairman, the floor statements of the Senate or House majority leader, the committee testimony of witness A in the Senate or that of witness B, C, or D in the House, the staff analyses of the House or the Senate, or the floor colloquy of two random members of the House or two other random members of the Senate.[36] All in all,

[36] See, e.g., *Nat'l Pride*, in which the Chief Justice in her dissent proposed to give meaning to an allegedly "ambiguous" provision of our constitution by assessing the language of campaign brochures by private organizations, statements of the Michigan Civil Rights Commission, the results of a private telephone survey, and a "wealth of extrinsic informa-

this is a fine process, except that it is not a legal or judicial process. Instead, it is a process in which judges in the very guise of selecting the tools and factors to be employed in "interpreting" the law are effectively its formulators—in short, judges who are wielding the legislative, not the judicial, power.

A critical strength of a judicial philosophy committed to exercising only the constitution's "judicial power" is that reasonably clear rules of decision-making are established *before the fact*. That is, a judge essentially promises the parties that he or she will decide their case, as with all others, by attempting to discern the reasonable meaning of relevant statutes or contracts and that this will be done by relying upon recognized rules, and tools, of interpretation. By contrast, under the Chief Justice's approach to ambiguity, in which there is essentially a limitless array of rules, and tools, that may be employed for "defining" the law apart from its language, there is no consistently applied interpretative process with which the judge promises beforehand to comply. He or she may promise to be "fair," and

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tion available." *Nat'l Pride*, 481 Mich at 95-96 (KELLY, J., dissenting). In response, the majority rejected her "apparent proposition that any stray bit of historical flotsam or jetsam can serve as guidance in giving meaning to the constitution." *Id.* at 84 n 25. See also Kelly, *The fatal weakness in the Michigan Supreme Court majority's textualist approach to statutory construction*, 10 TM Cooley J Prac & Clinical L 287, 309 (2008), in which she describes the dissenting justices' "distrust" of legislative history, without evidencing any understanding of the basis for this "distrust," and without recognizing differing attitudes toward different types of legislative history. See, e.g., note 11 of this opinion. It should not go unremarked that in this case, it is the *dissent* that cites legislative history, albeit a uniquely persuasive and statutorily grounded type of legislative history, as a relevant factor in interpreting § 315(1), while the Chief Justice, the presumed advocate of legislative history, for no apparent reason excludes this from her post-ambiguity toolbox. Why? Apparently because she can choose to consider this factor if she wants to, and she can choose not to consider this factor if she does not want to.

he or she may seek to be fair, but there are no rules for how this fairness is to be achieved. There is only the promise that the judge will address each dispute on a case-by-case basis, using whatever rules, and whichever tools, he or she believes are required in that instance. And the suspicion simply cannot be avoided that these varying and indeterminate rules, and tools, may be largely a function of the outcome preferred by the judge and by his or her personal attitudes toward the parties and their causes. Any interpretative rules will be identified only *after the fact*, and these "rules" may or may not have been invoked in resolving yesterday's dispute, and may or may not be employed in resolving tomorrow's dispute. Any judge can concoct an *after-the-fact* rationale for a decision; the *judicial* process, however, is predicated upon *before-the-fact* rationales. An *ad hoc* process is not a judicial process at all. In the place of predetermined rules—otherwise understood as the rule of law—the Chief Justice would substitute rules to be determined later.[37]

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[37] The arbitrariness of the Chief Justice's approach can be glimpsed in *Haynes*, 477 Mich at 45 (KELLY, J., concurring), in which we are instructed that whenever ambiguity arises, a judge may consider another jurisdiction's statute that is "substantially similar" to the Michigan statute before him or her. "[Foreign] case law interpreting [that jurisdiction's statute] is instructive with regard to the correct interpretation of our statute." *Id.* Yet, shortly thereafter in *DaimlerChrysler Corp*, 482 Mich at 241 (KELLY, J., concurring in the result), we are instructed by the same judge that, "[g]iven that these cases involve statutes that differ from Michigan's statutes, I find them of little assistance in determining the proper interpretation of the Michigan statute." Fair enough; distinctions may be legitimately made in these kinds of things. But where there are 49 other state jurisdictions in the United States, and thousands of other local jurisdictions, and millions of other private contracts entered into in these jurisdictions, it would not seem terribly difficult to identify somewhere and someplace a statute or contract whose interpretation can be invoked in support of an interpretation sought to be obtained in this state. Nor is there any apparent reason why in an appropriate case one of the Chief Justice's amorphous

F. CHIEF JUSTICE'S TOOLS IN THIS CASE

What among the universe of available post-ambiguity tools does the Chief Justice choose to consider in reaching her decision here? The Chief Justice states that "caselaw," among other tools, supports her interpretation of § 315(1). In evaluating this factor, the Chief Justice mainly invokes broad "public policy" considerations. For example, the Chief Justice, citing *Harvlie v Jack Post Corp*, 2006 Mich ACO 69, emphasizes that the "WCAC has explicitly recognized the importance of holding employers and their insurance carriers responsible for a proration of attorney fees pursuant to § 315(1)." *Ante* at 332. Yet, in *Harvlie*, this "importance" was drawn from the following: "The attorney fee provision of Section 315 was *designed to promote the assistance of counsel* in medical dispute cases where there are minimal or no wage loss benefits from which to obtain an attorney fee." 2006 ACO 69, at 3 (emphasis added). In essence, *Harvlie* found that interpreting § 315(1)'s final sentence to require an employer to pay attorney fees made it more likely that an attorney would take a case in which the only recovery available was based on medical costs. Thus, the "importance" of enforcing the majority interpretation is based on this putative "design" even though the reasoning in *Harvlie* in no way bears this out. The majority interpretation does not obviously "promote the assistance of counsel" because the employee's attorney recovers the same amount—the contingency fee calculated on the recovered medical expenses—regardless of who pays his fees. See notes 4 and 5 of this opinion. Thus, the supposed "design" set forth in *Harvlie* is a false one. Nonetheless, the

post-ambiguity tools could not consist of a judicial decision from France, New Guinea, or Azerbaijan. See, generally, *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

Chief Justice insists that this reasoning somehow sustains her interpretation and supplies better guidance than the actual words of § 315(1).[38]

The Chief Justice next relies on *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546, 552; 324 NW2d 28 (1982), in which, after resolving a workers' compensation attorney fees dispute on the grounds that an administrative rule did not allow an employee to recover fees from a medical provider or employer,[39] the Court proceeded to opine that such a result did not serve "justice." However, whatever an individual judge's personal sense of "justice," it is the responsibility of that judge to do "justice under law." Judges have no proper authority to countermand the decisions of the lawmaker by substituting a personal sense of "justice" for the justice of the law. I agree that there can be reasonable disagreement as to whether the position asserted by plaintiff or by defendants in this case is more "just." However, that question has never been thought to be dispositive, or even relevant, in giving meaning to statutes and contracts, and it is not made more dispositive or relevant because it was addressed by the lower court. Many persons, including judges, may have a strong personal sense of "justice"—how public resources should be apportioned, how rights and respon-

[38] The Chief Justice also cites *Harvlie* for her "public policy" argument that if employers are not held liable for employees' attorney fees, employers will "have an incentive to deny medical benefits." *Ante* at 332. Yet, she never examines the consequences of the corollary "public policy" wherein employers would be penalized by attorney fees even if they have a *valid* dispute that the employee did not "receive[] a personal injury arising out of and in the course of employment." MCL 418.315(1).

[39] The Court of Appeals cases that followed also adhered to this rule. *Duran v Sollitt Constr Co*, 135 Mich App 610; 354 NW2d 277 (1984); *Zeeland Community Hosp v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984); *Nezdropa v Wayne Co*, 152 Mich App 451; 394 NW2d 440 (1986).

sibilities should be understood, how the limits of government should be defined—but it is "justice *under law*" that is the tool of the trade of the judge and that defines the judicial power. Moreover, even if ascertaining what constituted abstract "justice" in the instant case *did* define this Court's mission, the Chief Justice never even purports to explain why *her* conception of "justice"—requiring employers to pay employee's workers' compensation attorney fees—is somehow superior to alternative conceptions of "justice," including that of the Legislature, which has chosen to rely upon a different rule than the Chief Justice.[40]

The Chief Justice also relies on the WDCA's "remedial . . . nature" to support her interpretation. *Ante* at 332. The WDCA is indeed remedial, because it provides a remedy for employees injured on the job. Yet, the Chief Justice fails to explain why this purpose, as important as it obviously is, should be elevated above every other purpose of the Legislature. The WDCA is the Legislature's attempt to fulfill at least two pur-

[40] "The people have not forfeited lawmaking authority to a judicial aristocracy that may simply rewrite laws with which they disagree." *Karaczewski*, 478 Mich at 43. The Chief Justice's reliance on her own personal brand of "justice" also suffers from the lack of virtue of "overturn[ing] compromises made in the legislative process, second-guess[ing] judgments of the lawmaker, and render[ing] the law increasingly arbitrary and unpredictable." *Rowland*, 477 Mich at 226 (MARKMAN, J., concurring). It is also strange that, despite relying upon these post-ambiguity tools of "justice" and "public policy," neither the Chief Justice nor any other justice even made the slightest effort during oral argument to inquire into anything relevant regarding the "justice" or "public policy" of alternative interpretations of § 315(1), such as the economic impact of competing interpretations upon the health and competitiveness of Michigan's businesses, or the impact of competing interpretations upon workers' compensation insurance premiums. One might have thought such inquiries to be a useful precondition to judicial decisions predicated upon "justice" and "public policy."

poses: "to 'provide . . . not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.' " *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703, 710; 556 NW2d 839 (1996) (citations omitted).[41] By arbitrarily establishing priorities among the several purposes of the WDCA, the Chief Justice undermines the real-world negotiations and compromises that were engaged in by the Legislature. In the place of a statute enacted by a majority of the 148 members of the Legislature, the majority interpretation substitutes a statute approved only by four judges acting well beyond their proper authority.

The Chief Justice then asserts that she is empowered to "construe the act's terms liberally," *ante* at 332—rather than merely "reasonably." As a result of this process, one essentially indistinguishable from a judge asserting his or her right to place a thumb on the scales of justice, the Chief Justice proclaims that plaintiff is entitled under the WDCA to the greatest possible amount of recovery. *Ante* at 332. Is there anything more to the Chief Justice's "liberal" construction than that plaintiff prevails on everything? Is this all that is implied by a "liberal" construction? At what point does the Court decide that its "liberal" construction has fully accomplished the goals of the WDCA? When the employee receives all that he asks for? When an employer can no longer afford to maintain its insurance, or cannot afford to maintain an employee? Does a "liberal" construction militate in favor even of a recovery of benefits that is not contemplated by the actual language

[41] Most workers' compensation statutes "represent[] a compromise between the competing interests of disabled laborers and their employers." *Potomac Electric Power Co v Office of Workers' Compensation Programs Director*, 449 US 268, 282; 101 S Ct 509; 66 L Ed 2d 446 (1980).

of the WDCA? Having declined from the outset to attempt any "reasonable" interpretation of § 315(1), the Chief Justice is far more enthusiastic about proclaiming "ambiguity" and immediately proceeding to a "liberal" interpretation. That is, in the place of an interpretation that is grounded in some meaningful way upon the law itself, the Chief Justice much prefers an "interpretation" that is not really an interpretation at all. She engages in what is merely a political impulse, rather than any serious construction of the law as might once have been expected from a justice of the Supreme Court of this state. Rather than working to achieve the "best" possible or "most reasonable" interpretation of the law, the Chief Justice, apparently fearing that little good would come from such an approach, instead exercises a power that does not belong to judges under the pretext that she is actually engaging in some genuine interpretation of the law, albeit a "liberal" interpretation. While a genuine interpretation of the law is designed to achieve as perfect an understanding as possible of what the lawmaker has intended, a "liberal" interpretation appears here to be little more than a means to achieving a particular result.

In short, the Chief Justice invokes her own understanding of ambiguity for the purpose of providing some justification for her preferred course of "going beyond the plain language of the statute," and thereby avoiding the difficult process of giving fair meaning to a statute, the fair meaning of which may not be to her liking. "No judge should manufacture ambiguity." *Paige v Sterling Hts*, 476 Mich 495, 542; 720 NW2d 219 (2006) (CAVANAGH, J., concurring in part) (emphasis omitted). Yet, there is no longer any need to "manufacture ambiguity" in light of the extraordinarily low threshold by which it can be found under the Chief Justice's

definition. In virtually every instance in which ambiguity is invoked, the Chief Justice would circumvent the actual language of a statute or contract in favor of her own notion of how that statute or contract should be configured.

G. STARE DECISIS

After stating that "stare decisis does not apply" to the *Mayor of Lansing* standard for determining ambiguity, *ante* at 314 n 36, the Chief Justice nonetheless devotes almost a third of her opinion to rejecting the stare decisis test in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), constructing a new test, and then "apply[ing]" it to *Mayor of Lansing*. It should be emphasized that only one other justice is in agreement.[42] This leads to several reflections concerning the Chief Justice and precedent:

(1) The Chief Justice has repeatedly criticized other justices for "unnecessarily" overruling precedent.[43] What could be less "necessary" than to overturn a case she characterizes as nonbinding precedent? The Chief Justice has also previously stated that a departure from

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[42] Although the Chief Justice applies her newly formulated "compelling justification" standard to conclude that *Mayor of Lansing* should be overruled, she neglects even to apply her new stare decisis standard to determine whether *Robinson* itself should be overruled. In this regard, see also note 47 of this opinion.

[43] See, for example, *People v Smith*, 478 Mich 292, 331; 733 NW2d 351 (2007) (KELLY, J., dissenting); *Rowland*, 477 Mich at 248 (KELLY, J., concurring in part and dissenting in part); *Joliet v Pitoniak*, 475 Mich 30, 46; 715 NW2d 60 (2006) (KELLY, J., dissenting); *Rory v Continental Ins Co*, 473 Mich 457, 492; 703 NW2d 23 (2005) (KELLY, J., dissenting); *People v Hickman*, 470 Mich 602, 618; 684 NW2d 267 (2004) (KELLY, J., dissenting); *People v Kazmierczak*, 461 Mich 411, 427; 605 NW2d 667 (2000); (KELLY, J., concurring in part and dissenting in part); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 749; 614 NW2d 607 (2000) (KELLY, J., concurring in part and dissenting in part).

precedent must be supported by some "special justification."[44] What "special justification" could exist to overrule a case that she does not consider formally binding precedent?[45]

(2) Given that in this case the Chief Justice would expressly overrule, not one, but two of this Court's prior decisions,

> one is naturally tempted to re-inquire, see *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 223-228; 731 NW2d 41 (2007) (MARKMAN, J., concurring), whether the ongoing dispute between the [former] majority and Justice KELLY over overrulings of precedent truly concerns attitudes toward stare decisis or merely attitudes toward particular previous decisions of this Court. [*People v Smith*, 478 Mich 292, 322-323 n 17; 733 NW2d 351 (2007).]

"A justice's perspective on stare decisis is not evidenced by her willingness to maintain precedents with which she *agrees*, but by her willingness to maintain precedents with which she *disagrees*." *Rowland*, 477 Mich at 224-225 n 3 (MARKMAN, J., concurring). Now that the Chief Justice is positioned to overrule decisions with which she disagrees, her actions increasingly demonstrate that her former claims of fealty toward stare decisis were considerably overstated. Despite all her rhetoric concerning the importance of stare decisis for the exercise of the judicial power, see, e.g., her hollow claim that she possessed a "differing [and elevated]

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[44] See, for example, *People v Gardner*, 482 Mich 41, 85; 753 NW2d 78 (2008) (KELLY, J., dissenting); *Rowland*, 477 Mich at 254 (KELLY, J., concurring in part and dissenting in part); *People v Davis*, 472 Mich 156, 189; 695 NW2d 45 (2005) (KELLY, J., dissenting); *Hickman*, 470 Mich at 616 (KELLY, J., dissenting); *Robinson*, 462 Mich at 476 (KELLY, J., concurring in part and dissenting in part).

[45] Contrary to the Chief Justice's assertion, *ante* at 326 n 63, nowhere in this opinion is it stated that a standard for ambiguity is or is not "entitled to stare decisis" consideration.

esteem for stare decisis" than another justice, *People v Gardner*, 482 Mich 41, 88 n 31; 753 NW2d 78 (2008), such rhetoric was in reality little more than a means of communicating her opposition to overruling *particular* past decisions with which she agreed.[46]

(3) As I also asserted in *Rowland*, 477 Mich at 226:

> [N]o meaningful discussion of a court's attitude toward precedent can be based solely on an arithmetical analysis in which raw numbers of overrulings are simply counted. Such an analysis obscures that not all precedents are built alike, that some are better reasoned than others, that some are grounded in the exercise of discretionary judgments and others in the interpretation of plain language, that some are thorough in their analyses and others superficial.

The chart attached to my concurring opinion in *Rowland* demonstrates that the former majority's overrulings of precedent overwhelmingly occurred in cases involving what the then-majority justices viewed as the "misinterpretation of straightforward words and phrases in statutes and contracts, in which words that were *not* there were read into the law or words that *were* there were read out of the law." *Id.* at 226, 228-247. In contrast, the new majority's overrulings of precedent has moved toward just the opposite result, replacing decisions that sought to give reasonable

[46] The Chief Justice also stated in *Gardner*, 482 Mich at 87, that "stare decisis requires that we give those [earlier] decisions thoughtful and thorough consideration before tossing them aside." See also *Rowland*, 477 Mich at 256 ("The law has not changed. Only the individuals wearing the robes have changed. It is amazing how often the members of this majority have declared themselves more capable of understanding the law and reaching the "right" result than any justice who sat before.") (KELLY, J., concurring in part and dissenting in part); *Davis*, 472 Mich at 190 (overruling multiple cases "destabilizes our state's jurisprudence. It suggests to the public that the law is at the whim of whoever is sitting on the Supreme Court bench. Surely, it erodes the public's confidence in our judicial system.").

meaning to the words of the law with decisions in which "words that were *not* there were read into the law or words that *were* there were read out of the law." That is, when the previous majority overruled a precedent, it was to ensure that the decisions of this Court more closely reflected the judgments of the people's elected legislative representatives and it was to more closely align case law and statutory law. By contrast, when the new majority has overruled, or at least ignored, a precedent, it has been to create a greater disparity between that case law and the statutory law.

(4) Indeed, since Chief Justice KELLY became a part of the new majority, this majority has dealt with precedents it did not like in an especially inappropriate manner—by simply ignoring them. In the interest of clearing the law of this state of multiple and inconsistent precedents on the same matters of law, the former majority forthrightly and explicitly overruled precedents and never sought to obscure this process or to misleadingly minimize the number of overturned precedents, by either ignoring disfavored precedents or by dubiously "distinguishing" prior case law. Doubtlessly, because it is cognizant of the gap between its past rhetoric extolling the importance of stare decisis and its present actions disregarding stare decisis, the new majority has made an increasingly regular practice of simply ignoring inconvenient precedents.[47] As a result

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[47] See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), an order entered in which the new majority ignored *Vega v Lakeland Hosps*, 479 Mich 243; 736 NW2d 561 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), an order in which it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), an order in which it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606; 295 NW 331 (1940), and *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471; 592 NW2d 46 (1999); *Juarez v Holbrook*, 483 Mich 970 (2009), an order in which it failed to follow *Smith v Khouri*, 481 Mich 519; 751

for years to come, the clear rule of law will be stunted in this state as legal practitioners and judges will be able to pick and choose between competing and inconsistent precedents.

(5) The Chief Justice concludes that *Robinson*'s standard for overruling binding precedent is "insufficiently respectful of precedent" because "not once has the Court cited it as a basis for upholding a prior decision." *Ante* at 315-316 (emphasis omitted). The Chief Justice, however, fails to illuminate the reader as to the number of occasions on which *she* has concluded that binding precedent was wrongly decided and yet joined an opinion maintaining that precedent. Perhaps, this is because the answer is "never." Not once has the Chief Justice joined an

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NW2d 472 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), an order in which it failed to follow *Rowland*; *Scott v State Farm Mut Automobile Ins Co*, 483 Mich 1032 (2009), an order in which it failed to enforce *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997); *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), an order in which it again failed to abide by *Rowland*; and *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), in which it ignored *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004) (*Roberts II*).

In addition to ignoring precedents altogether, see *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009), in which the new majority avoided overruling *Roberts II*, for an illustration of a seriously dubious "distinguishing" of precedent. Such treatment of inconvenient precedents, reflected also in the Chief Justice's "comprehensive response" to these charges, *ante* at 326 n 63, which cites *Potter*, 484 Mich at 426-429 (KELLY, C.J., concurring), may well reduce the number of occasions on which precedents have been explicitly overruled, but they do nothing to uphold the values of stare decisis, which would seem to be the whole purpose of the exercise, while allowing multiple and inconsistent precedents to define the law of this state. In the end, there is no shortcut to resolving whether the new majority or the dissenting justices are correct in their characterizations of what the majority is doing. We can only identify what we believe to be the questionable decisions of the majority, identify the relevant precedents, and invite the reader to reach his or her own conclusions.

opinion finding a "compelling justification," or any other basis, for upholding a prior decision that she believed was wrongly decided.[48] More to the point, however, in disparaging the impact of *Robinson*, the Chief Justice disregards that cases in which *Robinson* would have been viewed as militating *against* an overruling of precedent would have been precisely those cases in which there never would have been an opinion issuing from this Court in the first place.[49]

(6) In response to my concurring opinion in *Rowland*, then-Justice KELLY stated:

> Justice MARKMAN challenges me to develop my "own standards" concerning when I would overturn precedent. But I have no need to create my own standards when well-reasoned standards have been established in the laws of this country for over 150 years. As noted in *McDowell* [*v Oyer*], when precedents are "free

[48] The Chief Justice responds that she has not upheld what she viewed as a wrongly decided precedent under the "compelling justification" standard because that "has *never* been the standard in Michigan during [her] years as a justice." *Ante* at 326-327 n 63. However, the point is that, even under her own similar "special justification" standard, see, e.g., *Gardner*, 482 Mich at 85 (KELLY, J., dissenting), or under *any other standard*, the Chief Justice has never joined an opinion to uphold what she viewed as a wrongly decided precedent. Her application of her "special justification" standard also belies her claim that she "followed *Robinson* in subsequent cases." *Ante* at 327 n 63.

[49] The Chief Justice also neglects to mention that *Robinson*, 462 Mich at 466 n 26, expressly identified two illustrative cases it likely would not have overruled even if it believed they had been wrongly decided: *Massey v Secretary of State*, 457 Mich 410; 579 NW2d 862 (1998), the case upholding term limits, and *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 469 (1973), this Court's initial advisory opinion with regard to automobile no-fault insurance. See also *People v Lively*, 470 Mich 248, 259; 680 NW2d 878 (2004) (MARKMAN, J., concurring) (finding it unnecessary to determine whether longstanding precedent should be overruled under *Robinson* standards); *People v Starks*, 473 Mich 227, 237; 701 NW2d 136 (2005) (MARKMAN, J., joining concurring opinion stating it was unnecessary to overrule a prior case).

> from absurdity, not mischievous in practice, and consistent with one another," they should be retained. *McDowell*, 21 Pa [417, 423 (1853)]. I would not lightly adopt new rules to guide my judicial philosophy when traditional tools used by courts throughout their history continue to serve well. [*Rowland*, 477 Mich at 255 n 8 (KELLY, J., concurring in part and dissenting in part).]

However, the Chief Justice now apparently finds it necessary to depart from the 150-year-old standard that she has previously hailed to fashion her own new "compelling justification" standard, with its seven evaluative criteria, and we are left to ponder why she no longer views the "free from absurdity, not mischievous in practice, and consistent with another" standard as a sufficient test.[50]

Moreover, it is perplexing why the Chief Justice feels that it is necessary to overrule *Robinson* and replace it with her new test given the similarity of these standards.[51] Why, to use her own standards, is this "neces-

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[50] It also should not be lost on the reader that these criteria are nothing more than a hodgepodge thrown together without any prior case law in support. Given her criticism that the test for ambiguity set forth in *Mayor of Lansing* was made up out of "thin air," *ante* at 311, one might think the Chief Justice would be especially careful to identify at least one or two courts that have utilized her own new criteria.

[51] Under the Chief Justice's standard, stare decisis analysis "begin[s] with the presumption that upholding the precedent involved is the preferred course of action." *Ante* at 317. Under *Robinson*, "[s]tare decisis is generally 'the preferred course.' " *Robinson*, 462 Mich at 463 (citation omitted). Under the Chief Justice's standard, we are to consider whether the precedent "has proven to be intolerable because it defies practical workability[.]" *Ante* at 320. Under *Robinson*, we considered "whether the precedent "defies 'practical workability.' " *Robinson*, 462 Mich at 464. Under the Chief Justice's standard, a court is to consider "whether reliance on the [precedent] is such that overruling it would cause a special hardship and inequity[.]" *Ante* at 320. Under *Robinson*, we considered "whether reliance interests would work an undue hardship." *Robinson*, 462 Mich at 464. Under the Chief Justice's standard, we are to consider "whether related principles of law have so far developed since

sary" and what is the "compelling justification" for doing this? Indeed, given the Chief Justice's statements that the "*application* [of *Robinson*] has proven superficial and cursory," *ante* at 315 (emphasis added), and that *Robinson*, as previously applied, is "insufficiently respectful of

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the rule was pronounced that no more than a remnant of the rule has survived[.]" *Ante* at 320. Under *Robinson*, we considered "whether changes in the law . . . no longer justify the questioned decision." *Robinson*, 462 Mich at 464. Under the Chief Justice's standard, we are to consider "whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification[.]" *Ante* at 320. Under *Robinson*, we considered "whether changes in the . . . facts no longer justify the questioned decision." *Robinson*, 462 Mich at 464. Under the Chief Justice's standard, we are to consider "whether other jurisdictions have decided similar issues in a different manner[.]" *Ante* at 320. Under *Robinson*, we considered both the "practical workability" of the questioned decision and "changes in the law," under which decisions from other jurisdictions could be used to address each factor. *Robinson*, 462 Mich at 464. Under the Chief Justice's standard, we are to consider "whether upholding the rule is likely to result in serious detriment prejudicial to public interests[.]" *Ante* at 320. Under *Robinson*, we considered both the "practical workability" of the questioned decision and "changes in the law or facts that no longer justify the questioned decision," *Robinson*, 462 Mich at 464, and each of these factors gave consideration, in the Chief Justice's language, to "whether upholding the rule is likely to result in serious detriment prejudicial to public interests[.]" *Ante* at 320.

The final factor in the Chief Justice's new test—"whether the prior decision was an abrupt and largely unexplained departure from precedent," *ante* at 320—ignores two aspects of this Court's former approach to stare decisis. First, by establishing a "lower level of deference" for cases that themselves have overruled precedent, the Chief Justice disregards that the particular precedents she so disfavors themselves often overruled decisions that "depart[ed] from precedent." *Ante* at 317-318. See the chart in *Rowland*, 477 Mich at 228-247 (MARKMAN, J., concurring), for a list of such decisions. Does the Chief Justice take this into account in her calculus? Second, I can only invite those interested in the workings of their judiciary to read the decisions of this Court in which the former majority overruled precedent, see *id.* at 223, and compare these with the decisions in which the new majority has now overruled or ignored precedent, see note 47 of this opinion, and assess which of these have been most "unexplained" or "abrupt."

precedent," *ante* at 316, one has to wonder whether her real concern is not with the *Robinson* test itself, but merely with what she views as the *misapplication* of that test.

V. CONCLUSION

I would reverse the Court of Appeals because the final sentence of MCL 418.315(1) does not allow a magistrate to assess an employee's attorney fees against the employer. Rather, that sentence only allows a magistrate to divide attorney fees among medical providers when the magistrate has ordered direct payment for medical expenses from the employer to those providers.

CORRIGAN, J., concurred with MARKMAN, J.

POTTER v McLEARY

Docket No. 136336. Argued March 4, 2009 (Calendar No. 7). Decided July 31, 2009.

Brian Potter brought a medical malpractice action in the Washtenaw Circuit Court against Richard C. McLeary, M.D., and others. The plaintiff sent a notice of intent to sue Huron Valley Radiology, P.C., and Kristyn H. Murry, M.D., eight days before the statutory period of limitations expired, and sent a separate notice of intent to St. Joseph Mercy Hospital Ann Arbor, Emergency Physicians Medical Group, P.C., and Robert Domeier, D.O., 25 days before the period of limitations expired. However, the affidavits of merit that the plaintiff filed with his complaint did not contain the statutorily required statement on proximate cause, and no conforming affidavits were submitted before the limitations period expired. The court, Donald E. Shelton, J., denied the defendants' motions for summary disposition, and the defendants appealed. The Court of Appeals consolidated the appeals. The Court of Appeals, WILDER, P.J., and ZAHRA, J. (DAVIS, J., dissenting), reversed, concluding that the plaintiff's complaint should have been dismissed with prejudice because the affidavits of merit attached to the complaint did not conform to the requirements of MCL 600.2912d. 274 Mich App 222 (2007). The Supreme Court, in lieu of granting leave to appeal, reversed the portion of the Court of Appeals judgment that stated that the complaint should be dismissed with prejudice, specified that the dismissal should be without prejudice, and remanded the matter to the Court of Appeals for consideration of the remaining issues. 480 Mich 915 (2007). On remand, the same Court of Appeals panel held unanimously that an affidavit of merit is presumptively valid, and therefore tolls the running of the limitations period when filed with the complaint, until it is successfully challenged in a judicial proceeding. The proper remedy for a successful challenge is dismissal without prejudice, affording the plaintiff whatever time remains in the period of limitations to file a complaint with conforming affidavits of merit. Specifically, the Court of Appeals held that the notice of intent sent to Dr. Murry was sufficient to put her on notice of the nature of the claim and properly set forth the manner in which she allegedly breached the standard of care and what actions she should have taken to avoid

the breach. The Court further held that the trial court properly denied summary disposition on the basis of the notices of intent to all the defendants except Huron Valley Radiology, with respect to which summary disposition should have been granted without prejudice to allow the plaintiff to cure the notice of intent by stating the specific standard of care applicable to Huron Valley Radiology. 278 Mich App 279 (2008). The Supreme Court granted the plaintiff's application for leave to appeal, limited to the issue whether Huron Valley Radiology is a health facility or agency to which a plaintiff must provide notice under MCL 600.2912b(1). 482 Mich 1004 (2008). The defendants' application for leave to appeal was held in abeyance pending the decision on the first application. 756 NW2d 85 (2008). After oral argument, the Supreme Court directed the parties to submit supplemental briefs addressing whether, if notice to Huron Valley Radiology was not required, the applicable statute of limitations was nonetheless subject to statutory tolling under former MCL 600.5856(d). 483 Mich 922 (2009).

In an opinion by Justice HATHAWAY, joined by Chief Justice KELLY and Justices CAVANAGH and WEAVER, the Supreme Court *held*:

A plaintiff must provide a timely notice of intent to a professional corporation before commencing a medical malpractice action when the claims against the professional corporation are based on vicarious liability for the actions of a licensed health care provider who is rendering professional services. The notice of intent filed in this case was fully compliant with the plain language of MCL 600.2912b(4), which does not require that the legal relationships between the parties be identified. If the only claim asserted against a professional corporation is based on vicarious liability, MCL 600.2912b does not require a plaintiff to set forth the legal doctrine of vicarious liability in the notice of intent. In light of MCL 450.225, a professional corporation can only render professional services through its licensed health care provider. Where the notice of intent names both the professional corporation and the provider, the notice of intent is fully compliant if it sets forth all the factual and medical information necessary to inform the professional corporation of the nature of the claim being asserted against the physician-provider. Because the plaintiff's notice of intent meets these requirements, dismissal is not warranted.

1. Professional corporations are created by the Professional Service Corporations Act, MCL 450.221 *et seq*., which provides that a professional corporation, while a separate legal entity, does not render professional services on its own; it can only render professional services through its employees or agents who are

licensed or legally authorized to render those services. Accordingly, a professional corporation rendering professional services involving health care and the health care provider are treated as the same entity.

2. To determine whether a claim against a professional corporation sounds in medical malpractice rather than ordinary negligence, a two-pronged test must be met: first, the claim must occur in the course of a professional relationship and, second, the claim must pose questions of medical judgment outside the realm of common knowledge and experience. Further, only those health care providers and facilities designated within MCL 600.5838a may be sued for malpractice. The amendment of MCL 600.5838a to include professional corporations evinces a clear legislative intent to include professional corporations among the entities against which a medical malpractice action may be asserted.

3. A notice of intent to bring a medical malpractice claim alleging only vicarious liability is not statutorily required to specifically set forth the legal theory of vicarious liability or to include a statement of the defendant's employment relationship with the health professional whose actions gave rise to the suit. Because a professional corporation can only render professional health care services through its licensed health care providers, the parties are effectively the same actor for the purpose of vicarious liability claims; therefore, there is no need for a claimant to include the same information in the notice of intent for both parties.

Chief Justice KELLY, concurring, wrote separately to address Justice MARKMAN's comments regarding the majority's lack of respect for the doctrine of stare decisis and to explain why the accusation that the Court has been ignoring precedent is incorrect.

Order holding application for leave to appeal in abeyance vacated, application for leave to appeal denied, Court of Appeals judgment reversed, and case remanded for further proceedings.

Justice CORRIGAN, concurring in part and dissenting in part, agreed with the majority and the Court of Appeals that the plaintiff's notice of intent was sufficient as to Murry. She dissented from the majority's holding that Huron Valley Radiology was entitled to a notice of intent. She concurred with and joined part I of Justice YOUNG's opinion, agreeing that Huron Valley Radiology is neither a health professional nor a health facility entitled to notice under MCL 600.2912b. Because Huron Valley Radiology was not entitled to a notice of intent, the plaintiff was not entitled to tolling. She shared the concerns stated in part III(C) of Justice MARKMAN's opinion regarding Justice YOUNG's conclusion

that if a notice of intent is sufficient as to one defendant, the statute of limitations is tolled as to all defendants. She agreed with Justice MARKMAN's result that the plaintiff's complaint was untimely filed and accordingly would hold that the action against Huron Valley Radiology was barred by the statute of limitations. She also concurred with part III(D) of Justice MARKMAN's opinion concerning whether a plaintiff can retroactively amend the notice of intent. She dissented from the majority's holding that the plaintiff's notice of intent was sufficient as to Huron Valley Radiology and would not reach the sufficiency of the notice issue at all for the reasons set forth in part III(E) of Justice MARKMAN's partial concurrence and dissent, with which she fully concurred and joined.

Justice YOUNG, concurring in part and dissenting in part, concurred only in the holding of the majority opinion that Huron Valley Radiology is not entitled to dismissal. He dissented from the majority's holding that a plaintiff is required to serve a professional corporation not enumerated in MCL 333.20106(1) with a notice of intent to commence a medical malpractice action under MCL 600.2912b, because such an entity is neither a "health professional" nor a "health facility" under MCL 600.2912b. He would additionally hold that the statute of limitations on the claim against Huron Valley Radiology was tolled pursuant to MCL 600.5856(d) because the plaintiff provided a notice of intent in compliance with the MCL 600.2912b for a claim that would have been barred during the applicable notice period. He dissented from the majority's analysis regarding whether the plaintiff's notice of intent was deficient because MCL 600.2912b requires a plaintiff to provide a statement of the factual basis for the claim, which, if the claim is one alleging vicarious liability, must include a statement regarding the principal-agent relationship on which the claim is based. Because the plaintiff did not include a statement of the relationship of Huron Valley Radiology to the other individual defendants, the plaintiff's notice of intent was defective.

Justice MARKMAN, concurring in part and dissenting in part, agreed with the majority that Huron Valley Radiology was entitled to a notice of intent, and would affirm the portion of the Court of Appeals opinion that held that the plaintiff's notice of intent was sufficient with regard to Murry. He would also affirm the portion of the Court of Appeals that held that the plaintiff's notice was insufficient with regard to Huron Valley Radiology because the notice did not contain a statement of the applicable standard of practice or care alleged by the claimant with regard to that entity, including an indication whether the plaintiff was

alleging direct or vicarious liability, as MCL 600.2912b(4)(b) and *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679 (2004), require. In accordance with MCL 600.5856(d) and *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57 (2002), he would reverse the portion of the Court of Appeals opinion that held that the defective notice of intent tolled the statute of limitations and would dismiss the action against Huron Valley Radiology with prejudice. The majority reached its conclusion that no dismissal is necessary in this case by addressing issues not properly before it, violating this Court's own internal rules, relying on dubious distinctions to avoid precedent, and completely rewriting the relevant statutory provisions.

1. ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A CLAIM — PROFESSIONAL CORPORATIONS.

A professional corporation rendering professional health care services and the health care provider are treated as the same entity for the purpose of providing a notice of intent to bring a claim for medical malpractice (MCL 450.221 *et seq*., 600.2912b).

2. ACTIONS — MEDICAL MALPRACTICE — PROFESSIONAL CORPORATIONS.

A claim against a professional corporation sounds in medical malpractice rather than ordinary negligence if the claim occurs when the professional corporation is rendering services through a licensed or authorized officer, employee, or agent as set forth in MCL 450.225, and if the claim poses questions of medical judgment outside the realm of common knowledge and experience.

3. ACTIONS — MEDICAL MALPRACTICE — HEALTH FACILITIES OR AGENCIES — HEALTH CARE PROFESSIONALS.

Only those health care providers and facilities designated in the statutory provision that addresses the accrual of medical malpractice claims may be sued for medical malpractice (MCL 600.5838a).

4. ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A CLAIM — VICARIOUS LIABILITY.

A notice of intent to bring a medical malpractice claim that alleges only vicarious liability need not specifically set forth the legal theory of vicarious liability or include a statement of the defendant's employment relationship with the health professional whose actions gave rise to the suit (MCL 600.2912b).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *J. Martin Bartnick* for Brian Potter.

Chapman and Associates, P.C. (by *Ronald W. Chapman* and *Brian K. Richtarcik*), for Huron Valley Radiology, P.C., and Kristyn Murry, M.D.

Amicus Curiae:

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *Linda M. Garbarino*) for Cardiovascular Clinical Associates, P.C.

HATHAWAY, J. At issue before this Court is the proper interpretation of the statutory provision requiring a notice of intent to sue (NOI) in medical malpractice actions.[1] This case raises the issue whether a professional corporation (PC) must be provided an NOI before the commencement of the medical malpractice action. It also raises the issue of what statements must be set forth in an NOI to satisfy the requirements of MCL 600.2912b(4) when a claim being made against the PC is based solely on a PC's vicarious liability for its physician.

We hold, on the basis of the plain language of the relevant statutes, that when claims alleged against a PC are predicated on its vicarious liability for a licensed health care provider rendering professional services, an NOI must be provided. The NOI provision, MCL 600.2912b, clearly states that a plaintiff must provide all health professionals and health facilities an NOI before commencing a medical malpractice action. MCL 600.5838a delineates those health care providers and facilities against which claims of medical malpractice may be asserted.[2] Claims asserted against providers and facilities not delineated in § 5838a sound in ordinary

[1] MCL 600.2912b.

[2] *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008).

negligence.[3] Because § 5838a specifically refers to PCs in its definitional section, a claim against a PC sounds in malpractice, but only when the claim asserted against the PC is for rendering professional services as defined in MCL 450.225. Under these circumstances, a PC must be provided an NOI.[4] The claim against Huron Valley Radiology, P.C., is one based on vicarious liability for the professional services of its licensed health care provider-employee; hence, plaintiff Brian Potter was required to provide a timely NOI as the action is one sounding in medical malpractice.

Moreover, we hold that the NOI filed in this case was fully compliant with the plain language of § 2912b(4), which governs its contents. First, there is no requirement in § 2912b(4) to set forth the legal relationships between named parties; rather, the plain language of § 2912b(4)(f) only requires naming each party to be sued. Secondly, where the only claim asserted against a PC is one for vicarious liability, and hence no other standard of care is being asserted against the PC, there is no requirement within § 2912b that mandates that a claimant set forth the legal doctrine of vicarious liability in the NOI.

The claim at issue in this case was one for vicarious liability only. In light of MCL 450.225, a PC can only render professional services through its licensed health care provider. Where the NOI names both the PC and the provider, the NOI is fully compliant as long as it sets forth all the factual and medical information necessary

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[3] See *id*. at 172.

[4] Conversely, when a claim asserted against a PC involves the actions of an employee or agent who is unlicensed or not rendering professional services as delineated in MCL 450.225, the NOI requirement would be unnecessary, because such a claim would sound in ordinary negligence rather than medical malpractice.

to inform the PC of the nature of the claim being asserted against the physician-provider. Because this NOI met these requirements, it was fully compliant and there is no need to dismiss this action on the basis of the NOI. We therefore reverse the Court of Appeals judgment and remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This is a medical malpractice action involving an alleged misreading of an MRI by defendant Kristyn H. Murry, M.D., on June 7, 2001. This misreading allegedly caused a delay in a needed emergency surgical procedure on plaintiff's spine. This delay resulted in permanent nerve damage to plaintiff's spine that impairs his ability to function, including causing difficulty with such things as walking and urinating. At the time of the alleged malpractice, Murry was employed by Huron Valley Radiology.

The procedural history of this case is complicated and lengthy. This case has been pending in our appellate system for over four years as the courts have conducted an exhaustive review of the content of Potter's affidavit of merit and his NOI. The Court of Appeals has issued two opinions, and we are reviewing this case for the second time.[5] The most recent Court of Appeals opinion summarized this long journey through our appellate system and the reasoning behind the rulings:

> In these consolidated appeals, defendants appealed by leave granted orders in this medical malpractice action denying their motions for summary disposition pursuant to MCR 2.116(C)(7). Previously, a majority of this Court

[5] *Potter v McLeary*, 482 Mich 1004 (2008); *Potter v McLeary*, 480 Mich 915 (2007); *Potter v McLeary*, 278 Mich App 279; 748 NW2d 599 (2008); *Potter v McLeary*, 274 Mich App 222; 732 NW2d 600 (2007).

reversed, holding that plaintiff's complaint should be dismissed with prejudice because the attached affidavits of merit did not conform to the requirements of MCL 600.2912d. *Potter v McLeary*, 274 Mich App 222; 732 NW2d 600 (2007). In lieu of granting leave to appeal, our Supreme Court reversed the portion of this Court's judgment "dismissing the complaint *with* prejudice, because the dismissal should have been *without* prejudice . . . ." See 480 Mich 915 (2007) (emphasis in original). Our Supreme Court remanded to this Court for consideration of the remaining issues not addressed previously. We now affirm in part, reverse in part, and remand.

As noted in our previous opinion, the alleged malpractice took place on June 7, 2001. The period of limitations in medical malpractice cases is two years from the date the claim accrued. MCL 600.5805(6). Presuming the notice of intent was sufficient, the running of the period of limitations would have been tolled for 182 days from the date of the notice. MCL 600.2912b(1). A notice of intent was sent to defendants Huron Valley Radiology, P.C., and Kristyn H. Murry, M.D., on May 30, 2003, leaving eight days remaining before the period of limitations expired. A notice of intent was sent to defendants St. Joseph Mercy Hospital Ann Arbor, Robert Domeier, D.O., and Emergency Physicians Medical Group, P.C., on May 13, 2003, leaving 25 days before the period of limitations expired. The notices tolled the running of the limitations periods, which recommenced on November 30, 2003, and on November 13, 2003, respectively. The limitations period expired on December 8, 2003, for all defendants. Plaintiff's complaint was filed on November 4, 2003.

There was no serious dispute in our prior decision that the affidavits of merit were fatally defective because they failed to state how the physicians' alleged failures related to plaintiff's alleged injuries, so they did not contain the required statement of proximate cause. See MCL 600.2912d. No conforming affidavits of merit were filed by December 8, 2003. A majority of this Court previously determined that plaintiff had therefore not filed an affidavit of merit at all, pursuant to *Geralds v Munson Health-*

care, 259 Mich App 225, 240; 673 NW2d 792 (2003), and *Mouradian v Goldberg*, 256 Mich App 566, 574; 664 NW2d 805 (2003), so plaintiff's complaint should be dismissed with prejudice. This Court therefore deemed it unnecessary to address defendants' challenges to plaintiff's notices of intent.

After this Court's previous decision, our Supreme Court overruled *Geralds* and *Mouradian* as having misapplied the case of *Scarsella v Pollak*, 461 Mich 547, 553; 607 NW2d 711 (2000). *Kirkaldy v Rim*, 478 Mich 581, 583-584; 734 NW2d 201 (2007). Our Supreme Court explained that *Scarsella* had only held that "a medical-malpractice complaint filed *without* an affidavit of merit" was ineffective and would not toll the running of the applicable limitations period. *Id*. at 584 (emphasis in original). It further explained that *Geralds* and *Mouradian* had wrongly extended that holding to medical-malpractice complaints that were actually filed with affidavits of merit, but where those affidavits of merit failed to conform to the requirements of MCL 600.2912d. *Kirkaldy*, *supra* at 584-585. Our Supreme Court concluded that an affidavit of merit is presumptively valid—and therefore tolls the running of a limitations period when filed with a complaint—until successfully challenged in a judicial proceeding. *Id.* at 585-586. "Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit," and the proper remedy for a successful challenge is dismissal without prejudice, affording the plaintiff "whatever time remains in the period of limitations" to file a complaint with a conforming affidavit. *Id*. at 586.

Our Supreme Court's partial reversal in this case was based on its decision in *Kirkaldy*. As applied to the case at bar, plaintiff's complaint, filed with the affidavits of merit, tolled the running of the limitations period. Because we conclude that those affidavits of merit did not conform to the requirements of MCL 600.2912b, the proper remedy is for the trial court to dismiss plaintiff's complaint without prejudice. Plaintiff may then file a new complaint with conforming affidavits of merit within the time remaining in the limitations period.

Because we declined to do so previously, we must address defendants Murry's and Huron Valley Radiology's challenges to the sufficiency of the notices of intent sent to them. Murry and Huron Valley Radiology first argue that the notice does not properly state the applicable standard of practice or care as required by MCL 600.2912b(4)(b). We agree, in part. The second paragraph of plaintiff's notice sets forth the following standard of care:

"The standard of care required Drs. Murry and/or [Gary] Augustyn and/or [Richard C.] McLeary to correctly read, interpret and report the correct results to the emergency room under the circumstances. Notwithstanding that standard of care, Drs. Murry and/or Augustyn and/or McLeary failed to properly interpret the MRI images and convey accurate information to the emergency room physician in charge of the patient that night."

The standard of care completely fails to make any reference to defendant Huron Valley Radiology. Our Supreme Court has explained that plaintiff is not obligated to provide a completely correct standard of care, but "plaintiff was required to make a good-faith averment of *some* particularized standard for each of the professionals and facilities named in the notices." *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 694; 684 NW2d 711 (2004) (emphasis in original). The standard alleged here is more than the tautology rejected in *Roberts*, and we find it adequate with regard to defendant Murry. Plaintiff articulated a specific standard that Murry must correctly read, interpret, and report the results of the MRI test. This is specific to the requirements of the service that plaintiff received from Murry. It was sufficient to put defendant Murry on notice of the nature of the claim, which was failure to properly identify and report plaintiff's injury. Therefore, it met the requirements of MCL 600.2912b(4)(b) with regard to Murry. However, the notice cannot satisfy all the statutory requirements with regard to defendant Huron Valley Radiology.

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> Because no other challenges to the notices of intent are raised, we will not consider them further. Therefore, the trial court properly denied summary disposition on the basis of the notices of intent to all defendants other than Huron Valley Radiology. With regard to Huron Valley Radiology, we believe that our Supreme Court's treatment of deficient—but actually filed—affidavits of merit should, by analogy, be applied to deficient—but again actually filed—notices of intent, as well. See *Kirkaldy*, *supra* at 586. Notices of intent are presumed to be valid and proper, so they support the filing of a complaint after the notice period has run, unless and until the notice is successfully challenged. The remedy to be applied if a notice is successfully challenged is dismissal without prejudice, affording the plaintiff the opportunity to cure the deficiency within the time remaining within the limitations period as theretofore tolled by the now-invalidated notice or the subsequent filing of the complaint.
>
> We hold as follows: summary disposition is granted without prejudice to Huron Valley Radiology on the basis of the notice of intent, summary disposition is denied to all other defendants on the basis of the notices of intent, and summary disposition is granted without prejudice to all defendants on the basis of the affidavits of merit. The applicable limitations periods remain tolled until entry of the grants of summary disposition. We remand for further proceedings consistent with this opinion.[6]

On March 20, 2008, plaintiff filed an application for leave to appeal asking this Court to grant leave to consider whether his NOI complied with the content requirements of § 2912b. On October 1, 2008, this Court granted leave; however, the issue was limited to the threshold question of whether it was necessary to provide an NOI to a PC. That order provided:

> On order of the Court, the application for leave to appeal the March 20, 2008, judgment of the Court of Appeals is

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[6] *Potter*, 278 Mich App at 281-286.

> considered and, it is granted, limited to the issue whether defendant Huron Valley Radiology, P.C., is a "health facility or agency" to which a plaintiff is required to provide notice under MCL 600.2912b(1). See MCL 333.20106(1).[7]

Despite the limited grant order, the parties addressed the content of the NOI and whether it was defective in their briefing and in oral argument while advancing their respective positions.[8] After oral argument, the Court expanded the grant order by asking the parties to file supplemental briefs on the additional issue of the tolling of the statute of limitations:

> Oral argument having been heard on March 4, 2009, the parties are directed to submit supplemental briefs addressing the issue whether, if a defendant professional corporation is not an entity to whom notice is required to be provided under MCL 600.2912b, the applicable statute of limitations, MCL 600.5805(6), was nonetheless subject to statutory tolling provided in former MCL 600.5856(d).[9]

As we have resolved the threshold issue by holding that Potter must provide an NOI to Huron Valley Radiology, we must also resolve the underlying issue of whether this NOI is defective in order to conclude the analysis in this case. We take particular note of the fact that it has

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[7] *Potter*, 482 Mich at 1004.

[8] Defendant Huron Valley Radiology addressed the sufficiency of the NOI issue extensively in its brief on appeal. This brief sets forth the sufficiency issue as one of the questions presented for us to decide. The brief also sets forth the entire content of the NOI and articulates the view that the NOI is defective. The brief cites statutes and cases to support its position. Moreover, in its prayer for relief, defendant asks us to decide the remaining issues in plaintiff's application for leave to appeal. One of the two remaining questions in plaintiff's application for leave to appeal is whether the NOI was defective. Further, plaintiff sufficiently addressed this issue at oral argument. The briefs and transcript of the oral argument can be viewed at <http://www.courts.michigan.gov/supremecourt/Clerk/03-09/136336/136336-Index.html>.

[9] *Potter v Murry*, 483 Mich 922 (2009).

been over eight years since the malpractice occurred and nearly six years since the subject NOI was mailed to defendants. Further, it has been over 5½ years since the complaint was filed, with the last four years having been devoted to the appeal of issues relating to the affidavit of merit and the NOI. The parties are still waiting to have a court address the merits of the case. Given that we have had briefing and argument on all necessary issues, we can decide in this opinion both whether the plaintiff must provide a PC an NOI before commencing an action as well as whether the subject NOI was compliant with § 2912b.

II. STANDARD OF REVIEW

The issues presented are issues of statutory interpretation. Statutory interpretation is a question of law, which this Court reviews de novo.[10] This Court also reviews de novo a trial court's decision regarding a motion for summary disposition.[11]

III. ANALYSIS

Interpretation of the NOI provision presents questions of statutory construction. Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature.[12] In determining the intent of the Legislature, this Court must first look to the language of the statute.[13] The Court must, first and foremost, interpret the language

[10] *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000).

[11] *Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

[12] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[13] *Id*.

of a statute in a manner that is consistent with the intent of the Legislature.[14] " 'As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.' "[15] Moreover, when considering the correct interpretation, the statute must be read as a whole.[16] Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[17] In defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.[18] A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.[19] Finally, the statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.[20]

A. THE NATURE OF SERVICES PROVIDED BY A PROFESSIONAL CORPORATION

Before we address whether a plaintiff must provide an NOI to a PC, it is necessary to review the legal structure of a PC and understand the nature of the services it provides. Since a professional corporation is a statutory creature, we look to the Professional Service

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[14] *Id.* at 135.

[15] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570, 579 (2008), quoting *Sun Valley*, *supra* at 237.

[16] *Sun Valley*, *supra* at 237.

[17] *Herman*, *supra* at 366.

[18] *Id.*, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

[19] *Wayne Co v Auditor General*, 250 Mich 227, 233; 229 NW 911 (1930).

[20] *Id*. at 234.

Corporation Act, MCL 450.221 *et seq*., for guidance. The relevant provision of that act provides, in pertinent part:

> *A corporation organized and incorporated under this act shall not render professional services within this state except through its officers, employees, and agents who are duly licensed or otherwise legally authorized to render the professional services within this state.* The term employee does not include secretaries, bookkeepers, technicians, and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required. [MCL 450.225 (emphasis added).]

This provision makes clear that a PC, while a separate legal entity, does not render professional services on its own; rather, it can only render professional services through its employees or agents who are licensed or legally authorized to render the professional services. This language stands as a legislative recognition that when a PC renders professional services, it is inexorably linked to the licensed health care provider. For all practical purposes, the PC and the health care provider are treated as the same entity when professional services are involved.[21] Moreover, a PC can perform other types of services or take other actions through unlicensed employees or agents, but such actions would not constitute professional services under the act. This delineation of types of services is emphasized not only in the first sentence, it is reasserted in the second sentence of MCL 450.225, which states that "[t]he term employee does not include secretaries, bookkeepers, technicians, and other assistants who are not usually and ordinarily considered by custom and

[21] See *Peters v Golds*, 366 F Supp 150 (ED Mich, 1973), which held that a PC is treated as a person for purposes of § 5838a.

practice to be rendering professional services to the public for which a license or other legal authorization is required." Thus, a PC can engage in two different types of actions: those that are professional services and those that are not. While the PC is vicariously liable for either of these types of actions pursuant to MCL 450.226,[22] this distinction is pertinent in determining whether the medical malpractice statutes apply to a particular cause of action.

B. PROFESSIONAL CORPORATIONS AND THE NOI REQUIREMENT

We now examine whether a plaintiff is required to provide an NOI to a PC before commencing a medical malpractice action. We start our analysis by examining the language of the NOI provision itself. Section 2912b states in relevant part:

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[22] MCL 450.226 provides:

> Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

> (1) *Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility* unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis added.]

The first sentence in this section provides critical guidance. The statute expressly limits the requirement of an NOI to an action alleging medical malpractice: "[A] person shall not commence an action alleging medical malpractice . . . ." Thus, the first step in the analysis is to determine whether the action sounds in medical malpractice or ordinary negligence. Only those actions sounding in medical malpractice are governed by the mandates of this statute.

This Court recently reiterated the method by which claims of medical malpractice and ordinary negligence are distinguished. In *Kuznar*, this Court was asked to determine whether a claim against a pharmacy for the actions of its non-licensed technicians sounded in medical malpractice or in ordinary negligence. In holding that the claims sounded in ordinary negligence, *Kuznar* reiterated the longstanding rule that claims sound in medical malpractice only when a two-pronged test is met. First, the claim must occur in the course of a professional relationship and, second, the claim must pose questions of medical judgment outside the realm of common knowledge and experience. If either prong is not met, the action sounds in ordinary negligence rather than medical malpractice.[23] With regard to the first prong, *Kuznar* stated:

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[23] There is no dispute that the second prong of the *Kuznar* test has been met in this case. The claim indisputably presents questions of medical judgment outside the realm of common knowledge and experience.

> A professional relationship exists if a person or an entity capable of committing medical malpractice was subject to a contractual duty to render professional health-care services to the plaintiff. Under the common law, only physicians and surgeons were potentially liable for medical malpractice. But in MCL 600.5838a(1), the Legislature expanded the scope of those who could be liable for medical malpractice. It provided for medical malpractice claims to be brought against "a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency . . . ."
>
> The primary issue in this case is whether the pharmacy technician and the pharmacy are covered by MCL 600.5838a(1).[24]

Kuznar correctly opined that only those health care providers and facilities designated within § 5838a could be sued for malpractice. Therefore, only those providers and facilities covered by § 5838a can meet the professional relationship prong of the test. Accordingly, *Kuznar* reviewed the language of § 5838a(1) to determine if a pharmacy was a designated entity. Section 5838a(1)(a) defines a "licensed health facility or agency" as "a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws."

Because § 5838a(1)(a) limits its application to only those health facilities and agencies licensed under article 17 of the Public Health Code, *Kuznar* next turned its attention to MCL 333.20106(1) to determine whether a pharmacy was within the list of designated entities. MCL 333.20106(1) provides that "health facility or agency" means:

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[24] *Kuznar*, *supra* at 177.

(a) An ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service.

(b) A clinical laboratory.

(c) A county medical care facility.

(d) A freestanding surgical outpatient facility.

(e) A health maintenance organization.

(f) A home for the aged.

(g) A hospital.

(h) A nursing home.

(i) A hospice.

(j) A hospice residence.

(k) A facility or agency listed in subdivisions (a) to (h) located in a university, college, or other educational institution.

Kuznar concluded that because pharmacies were not included within this list, the claims asserted against them did not sound in medical malpractice.[25] Rather, the claims asserted against the pharmacy sounded in ordinary negligence, and, accordingly, the medical malpractice statutes simply did not apply. It is this same statutory provision and analysis that has led to the question we now address. Because this same list of health facilities contained in § 333.20106(1) does not include PCs, the question arises whether PCs are exempt from any of the requirements of the medical malpractice statutory scheme. We conclude that it is

[25] We note that satisfying the first prong of *Kuznar* requires more than mere inclusion within the Public Health Code lists. The service provided must also be a professional service, the determination of which requires further analysis. For example, while hospitals are included in the list, not all hospital employees, such as janitors and dietary aides, provide professional services. However, inclusion within either § 5838a or the Public Health Code lists is a necessary predicate to an action sounding in medical malpractice.

unnecessary to refer to the list in § 333.20106(1) in this instance because the plain language of § 600.5838a, as amended effective April 1, 1994, expressly includes professional corporations within its definitional section.

Section 5838a(1), as amended, provides in pertinent part:

> For purposes of this act, *a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional*, *licensed health facility* or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, *whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a* sole proprietorship, partnership*, professional corporation*, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. *As used in this subsection*:
>
> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws.
>
> (b) "*Licensed health care professional" means an individual licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, and engaged in the practice of his or her health profession in a* sole proprietorship, partnership, *professional corporation*, or other business entity. However, licensed health care professional does not include a sanitarian or a veterinarian. [Emphasis added.]

This amendment of § 5838a was enacted as part of the same package of bills that created the NOI provision

in April 1994.[26] The amended § 5838a refers to professional corporations twice. Before this amendment, § 5838a made no reference whatsoever to professional corporations.[27] This specific addition of *professional corporations* to § 5838a was a clear statement by the Legislature that it intended a PC to be an entity against which a medical malpractice action could be asserted. Further, the placement of the reference to *professional corporations* within § 5838a(1)(b) (defining heath care professionals), rather than within § 5838a(1)(a) (defining health facilities), stands as a recognition of the nature of services as delineated in the Professional Service Corporation Act, MCL 450.225. When a PC renders professional services, it is rendering those professional services through the licensed health care pro-vider and the two are treated as though they are one entity.

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[26] Section 5838a and § 2912b were both amended by 1993 PA 78, effective April 1, 1994.

[27] The former § 5838a(1) provided:

> A claim based on the medical malpractice of a person who is, or who holds himself or herself out to be, a licensed health care professional, licensed health facility or agency, employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, or any other health care professional, whether or not licensed by the state, accrues at the time of the act or omission which is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
>
> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22181 of the Michigan Compiled Laws.
>
> (b) "Licensed health care professional" means an individual licensed under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws. Licensed health care professional does not include a sanitarian or a veterinarian.

Finally, § 5838a recognizes that some services provided by a PC are professional services while others are not. Where the services provided are *professional services* rendered by a licensed health care provider, any claim challenging those services as being negligent sound in medical malpractice, and the statutes governing medical malpractice apply. Where the services provided by a PC are not professional services as defined in MCL 450.225, the claim would not be subject to the medical malpractice requirements because those claims sound in ordinary negligence. To hold otherwise would negate the intent of the Legislature and ignore the proper rules of statutory construction, which require that any one statute be read in conjunction with other relevant statutes to ensure that legislative intent is being correctly ascertained.

Accordingly, in the instant case, the first prong of the *Kuznar* test is met because a PC is a covered entity under § 5838a and the services provided were professional services. The second prong of the *Kuznar* test is also met because there is no dispute that the claims asserted posed questions of medical judgment outside the realm of common knowledge and experience. Consequently, because both prongs of the *Kuznar* test have been met, we conclude that this is a claim that sounds in medical malpractice. Because §2912b(1) clearly requires a claimant to provide a timely NOI before commencing a medical malpractice action, plaintiff was required to provide this PC with a timely NOI.

C. THE CONTENT REQUIREMENTS OF MCL 600.2912b

Because plaintiff did provide an NOI to Huron Valley Radiology, the next issue is whether the NOI was

defective. The resolution of this issue requires an examination of the content requirements of § 2912b. The Court of Appeals ruled that the instant NOI contained a defect, thereby necessitating dismissal of the action without prejudice. The purported defect in the NOI can be summarized as the failure of plaintiff to set forth a statement in the NOI that Dr. Murry was the employee of Huron Valley Radiology and that this PC was vicariously liable for the actions of its employee-doctor. We take note of the fact that both the trial court and the Court of Appeals held that the NOI was fully compliant with the content requirements under § 2912b(4) in all respects regarding Dr. Murry, a holding with which we fully agree. Also, we note that the only claim pursued against Huron Valley Radiology was one for vicarious liability for the actions of Dr. Murry, and the NOI fully informed Huron Valley Radiology and Dr. Murry of the claim being asserted against Dr. Murry. Thus, we are compelled to review § 2912b to determine if there is a statutory mandate to specifically set forth the legal relationship between these two parties in the NOI, and whether there is a statutory mandate to set forth that the claim asserted is one for vicarious liability when no other claims are being asserted. Our inquiry once again necessarily begins with an examination of the language of § 2912b.

The first question we examine is whether § 2912b requires that legal and employment relationships between the parties be set forth in an NOI. We hold that the answer is no. The content requirements for an NOI are set forth in subsection 2912b(4):

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

We find no language in this subsection that requires a claimant to set forth the nature of the relationship between the parties to be sued. To the contrary, subsection f clearly states that all that need be done in this regard is to identify the names of the health professional and facility being notified. We cannot add a requirement that is not contained in the statute's plain language. Moreover, we cannot assume that defendants were unable to comprehend the nature of the relationship between them without having a claimant advise them in writing that such a relationship exists. Certainly they are fully aware of the legal relationship between them.[28] More importantly, however, there simply is no requirement in the statute that a claimant

[28] Moreover, it would be illogical to assume that a claimant knows the precise legal relationship between defendants. The provider may have either an actual employment relationship with the PC or they may have a complex independent contractor arrangement. While the PC can be vicariously liable for the acts of either under MCL 450.226, the statute logically imposes no requirement on the claimant to allege the precise nature of the relationship.

advise the defendants of their legal or employment relationship.[29] Accordingly, Potter's NOI was not defective in this regard.

Our next query is whether § 2912b(4) contains a requirement that the claimant specifically set forth the legal theory of vicarious liability within the NOI, when vicarious liability is the only claim asserted. We again hold that the answer is an unequivocal no. There is nothing in the language of § 2912b(4) that states that a claimant must set forth the legal theory of vicarious liability. Nor can we add such a requirement to the statute. The statute is focused on a requirement that the claimants advise the recipient of the factual and medical basis of the claim being asserted.[30] If no other claim is asserted against the PC, then there is no

[29] However, even assuming for the sake of argument that there was a requirement to set forth legal relationships in the statute, the NOI meets that burden. Plaintiff's NOI does more than merely name the entities to be sued; the NOI names Huron Valley Radiology as well as the three individual physicians and "their employees or agents, actual or ostensible, thereof." This phrase is repeated three times throughout the NOI. This language is more than sufficient to provide Huron Valley Radiology with notice of the facts establishing the legal relationships at such an early stage of the proceeding.

[30] Any argument that it is necessary to plead facts supporting vicarious liability or to state the phrase "vicarious liability" as part and parcel of the "factual basis of the claim" is misplaced and misreads the NOI statute. Section 2912b(4) does not contain such a requirement and we must assume that the absence of the requirement was purposeful. If the Legislature wanted such a requirement, it could have easily included it. It could have phrased § 2912b(4)(a) as "the factual and legal basis for the claim and whether the claim is for direct liability or vicarious liability." But it did not do so. The Legislature could also have inserted additional mandates, such as requiring the claimant to set forth that the "provider is licensed to practice medicine in Michigan" or "the provider is licensed under a specific provision of the public health code." However, again, the Legislature chose not to do so. Absent statutory guidance, we cannot impose additional requirements upon claimants. The better judicial practice is to refrain from adding requirements to a statute that are not contained within its language.

possibility for confusion regarding the nature of the claim being asserted against it. If the claimant wishes to make some other claim against the PC, then the claimant would be required to set forth that additional claim in order to satisfy the § 2912b(4)(b) "applicable standard of care" requirement. But if the only claim asserted against the PC is one for vicarious liability, the "applicable standard of care" requirement is met because there is only one standard of care: the standard of care for the provider. There is no separate standard of care for the PC. This analysis not only holds true to the statutory language, but also fully recognizes that the agent and principal share a singular identity for purposes of performing professional services, pursuant to the statute governing professional corporations.[31] Accordingly, where the NOI adequately sets forth the claim against the agent or employee, the claimant need not repeat the same information, or state the words "vicarious liability" in the NOI, because the statute does not require the claimant to do so.

Moreover, we find Huron Valley Radiology's assertions especially troubling because it openly admits knowing and understanding that it is vicariously liable for the actions of its employee, Dr. Murry. In other words, while admitting that it employs Dr. Murry, Huron Valley Radiology simultaneously asks that we dismiss plaintiff's case for plaintiff's failure to tell it that it employs Dr. Murry. We query what purpose such a statement would serve. Huron Valley Radiology's proposition exalts form over substance in an intolerable manner. More importantly, however, because there is no requirement in the statute to state the legal term "vicarious liability" within the NOI, we will not hold

[31] MCL 450.225.

plaintiff to this requirement, nor will we write such a requirement into the statute.[32]

This holding is also consistent with this Court's longstanding principles forming the foundation of vicarious liability. A master is bound to keep his or her servants within their proper bounds, and is responsible if he or she does not. "The law contemplates that their acts are his acts, and that he is constructively present at them all."[33] This Court has long held that a principal "is only liable because the law creates a practical identity with his men [agents], so that he is held to have done what they have done."[34] This longstanding legal doctrine is embodied in MCL 450.225. As previously discussed, that statute recognizes that a PC can only render professional services through its licensed health care providers. Accordingly, with regard to vicarious

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[32] We do not believe that this Court's ruling in *Roberts v Mecosta Co Gen Hosp (Roberts II)*, 470 Mich 679; 684 NW2d 711 (2004), is dispositive. *Roberts II* discussed a similar issue that arose when the plaintiff asserted claims in a manner that left confusion regarding whether the claims asserted were for direct liability, vicarious liability, or both. The Court stated:

> Although it appears from plaintiff's complaint that she is claiming that the hospital and professional corporation are vicariously liable for the negligence of their agents, the notices of intent implied that plaintiff alleged direct negligence against these defendants for negligently hiring or negligently granting staff privileges to the individual defendants. [*Roberts II*, *supra* at 693.]

We question whether *Roberts II* was correctly decided because it adds a requirement not found in the language of the statute; namely, that statements be "particularized." However, *Roberts II* opined that because there was confusion with regard to whether the claim was for direct or vicarious liability, the PC was unable to understand the nature of the claims being asserted. In the case before us, no such potential for confusion exists, and, accordingly, *Roberts II* is distinguishable.

[33] *Smith v Webster*, 23 Mich 298, 299 (1871).

[34] *Id.* at 300. See also *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 52; 133 NW 938 (1911).

liability claims, the parties are in fact the same actor, and therefore, there is no need for a claimant to duplicate the same information in the NOI for both parties. If the information contained within the NOI is sufficient with regard to the agent, it is sufficient with regard to the principal, because they share a practical identity for purposes of that claim.

In sum, the issue is whether Huron Valley Radiology could reasonably be held to comprehend the nature of the claims being asserted against it. The NOI provided the necessary information for both the PC and the doctor to have such an understanding. The only claim asserted against Huron Valley Radiology was for the actions of Dr. Murry, and those actions were fully and adequately set forth in the NOI. Nothing more is required. We conclude that the NOI in this case was not defective and dismissal of the action is not warranted.

IV. CONCLUSION

We hold that a plaintiff must provide a timely NOI to a PC before commencing a medical malpractice action when the claims alleged against the PC are predicated on its vicarious liability for a licensed health care provider who is rendering professional services. Because the claim against Huron Valley Radiology is based on vicarious liability for the professional services of its employee, a licensed health care provider, plaintiff was required to provide a timely NOI as the action is one sounding in medical malpractice.

Moreover, we conclude that the NOI filed in this case was fully compliant with the plain language of § 2912b(4), which governs its contents. First, there is no requirement in § 2912b(4) to set forth the legal relationships between named parties; rather, the plain language of § 2912b(4)(f) only requires naming each

party to be sued. Secondly, where the only claim asserted against a PC is one for vicarious liability, and hence no other standard of care is being asserted against the PC, there is no requirement within § 2912b that mandates that a claimant set forth the legal doctrine of vicarious liability in the NOI.

The claim at issue in this case was one for vicarious liability only. In light of MCL 450.225, a PC can only render professional services through its licensed health care provider. Where the NOI names both the PC and the provider, the NOI is fully compliant so long as it sets forth all of the factual and medical information necessary to inform the PC of the nature of the claim being asserted against the physician-provider. Because this NOI meets these requirements, it is fully compliant and there is no need to dismiss this action on the basis of the NOI.

We therefore reverse the Court of Appeals judgment and remand the case to the trial court for further proceedings consistent with this opinion. Furthermore, we vacate the order abeying the application for leave to appeal in *Potter v McLeary* (Docket Nos. 136338 and 136339) and deny the application in light of this opinion.

KELLY, C.J., and CAVANAGH and WEAVER, JJ., concurred with HATHAWAY, J.

KELLY, C.J. (*concurring*). I fully agree with and sign the majority opinion in this case. I write for the sole purpose of responding to Justice MARKMAN's comments attacking the majority's respect for the doctrine of stare decisis. In his partial concurrence and partial dissent, Justice MARKMAN repeats a claim that he and Justices CORRIGAN and YOUNG have published numerous times

this term[1] with the same string of citations.[2] The claim is that their colleagues who comprise the majority in this case have been ignoring precedent. A review of the cases in the string citation serves to illustrate that the claim is simply false.

Justice MARKMAN claims that in *Vanslembrouck v Halperin*,[3] the Court ignored *Vega v Lakeland Hosps*.[4] However, *Vanslembrouck* is distinguishable from *Vega* because *Vega* determined that MCL 600.5851(1) is a saving provision, whereas *Vanslembrouck* held that MCL 600.5851(7) is a statute of limitations. Thus, these cases examined the effect of altogether different statutory provisions.

Justice MARKMAN also claims that in *Hardacre v Saginaw Vascular Services*,[5] the Court failed to follow *Boodt v Borgess Med Ctr*.[6] However, in *Hardacre*, the Court denied leave to appeal because the allegations in the plaintiff's notice of intent to find an action did not need to comply with *Boodt*. In *Hardacre*, the burden of explication of the standard of care was minimal.[7]

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[1] See, e.g., *Petersen v Magna Corp*, 484 Mich 300, 391-392; 773 NW2d 564 (2009) (MARKMAN, J., dissenting); *Chambers v Wayne Co Airport Auth*, 483 Mich 1081, 1082 (2009) (CORRIGAN, J., dissenting); *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032, 1036 (2009) (CORRIGAN, J., dissenting); *Beasley v Michigan*, 483 Mich 1025, 1027 (2009) (CORRIGAN, J., dissenting); *Juarez v Holbrook*, 483 Mich 970 (2009) (MARKMAN, J., dissenting). Justice YOUNG joined the dissenting statements in *Chambers*, *Scott*, *Beasley*, and *Juarez*.

[2] *Post* at 478 n 23.

[3] *Vanslembrouck v Halperin*, 483 Mich 965 (2009).

[4] *Vega v Lakeland Hosps at Niles-St Joseph, Inc*, 479 Mich 243; 736 NW2d 561 (2007).

[5] *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009).

[6] *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008).

[7] See *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 694 n 12; 684 NW2d 711 (2004).

Nor did the Court ignore precedents with which it disagrees in *Sazima v Shepherd Bar & Restaurant*.[8] Justice MARKMAN claims that the Court failed to follow *Chrysler v Blue Arrow Transport Lines*.[9] However, *Sazima* involved exceptions to the "going and coming" rule as set forth in *Camburn v Northwest School Dist.*[10] Thus, the Court was not bound by *Chrysler*.

Justice MARKMAN next claims the Court ignored *Smith v Khouri*[11] when it decided *Juarez v Holbrook*.[12] However, in *Juarez*, it was undisputed that the trial court performed a reasonableness analysis in calculating the proper attorney fee award. Therefore, a remand in light of *Smith* was unnecessary.

In *Beasley v Michigan*,[13] the Court considered the statutory notice provision of MCL 600.6431(3). Thus, contrary to Justice MARKMAN's claim, the Court was not bound by *Rowland v Washtenaw Co Rd Comm*.[14] *Rowland* interpreted the notice provision of MCL 600.1404(1); thus, the cases involved different statutory provisions altogether.

Likewise, Justice MARKMAN is incorrect in claiming that the Court failed to enforce *Thornton v Allstate Ins Co*[15] and *Putkamer v Transamerica Ins Corp of*

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[8] *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009).

[9] *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606; 295 NW 331 (1940).

[10] *Camburn v Northwest School Dist* (*After Remand*), 459 Mich 471, 478; 592 NW2d 46 (1999).

[11] *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

[12] *Juarez*, *supra*.

[13] *Beasley v Michigan*, 483 Mich 1025 (2009).

[14] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

[15] *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986).

America[16] in *Scott v State Farm Mut Auto Ins Co*.[17] In *Scott*, the Court of Appeals undertook a thorough analysis of the relevant no-fault jurisprudence and applied precedent as it has been understood for nearly 30 years.

Finally, the Court did not fail to abide by *Rowland* in *Chambers v Wayne Co Airport Auth*.[18] *Chambers* interpreted MCL 691.1406, while *Rowland* interpreted MCL 691.1404(1). Thus, the cases dealt with different statutory provisions and the Court was not bound to extend *Rowland* to the statute at issue in *Chambers*.

In summary, the accusation that the Court has been ignoring precedent is incorrect. Had other justices been in the majority in some of the decisions complained about, they might well have extended existing precedent to a new area of the law. But the refusal of those in the majority in this case to so extend precedent is quite different from a refusal on their part to apply it. This is a distinction that Justices MARKMAN, CORRIGAN, and YOUNG would do well to concede.

CORRIGAN, J. (*concurring in part and dissenting in part*). I agree with the majority and the Court of Appeals that plaintiff's notice of intent (NOI) was sufficient as to defendant Dr. Kristyn Murry. I respectfully dissent, however, from the majority's holding that defendant Huron Valley Radiology, P.C. (Huron), was entitled to an NOI. Instead, I concur with and join part I of Justice YOUNG's partial concurrence and partial dissent with regard to whether plaintiff was required to serve defendant Huron with an NOI to commence a medical malpractice action under MCL 600.2912b. I

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[16] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997).

[17] *Scott*, *supra* at 1032.

[18] *Chambers*, *supra*.

fully agree with Justice YOUNG that Huron is neither a "health professional" nor a "health facility" entitled to notice under MCL 600.2912b. Whether the Legislature, by oversight or design, excluded professional corporations such as Huron from the statutory definition of "health facility or agency" in MCL 333.20106(1), it is for the Legislature, and not this Court, to decide.

Because Huron was not entitled to an NOI, plaintiff was not entitled to tolling. I share Justice MARKMAN's concerns as discussed in part III(C) of his partial concurrence and partial dissent regarding Justice YOUNG's analysis of the tolling issue. Specifically, I disagree that as long as an NOI is sufficient as to one defendant, the statute of limitations is tolled as to all defendants. I agree with Justice MARKMAN's conclusion that plaintiff's complaint here was untimely filed. Accordingly, I would hold that the action against Huron was barred by the statute of limitations. Moreover, I also concur with part III(D) of Justice MARKMAN's opinion concerning whether plaintiff can retroactively amend an NOI.

Additionally, I dissent from the majority's holding that plaintiff's NOI as to Huron was sufficient. As an initial matter, I would not reach the sufficiency of the notice issue at all for the reasons set forth in part III(E) of Justice MARKMAN's partial concurrence and dissent, with which I fully concur and join. I also concur with Justice MARKMAN's discussion of this issue, *post* at 455 n 1. Because the Court's limited grant order did not instruct the parties to brief this issue and because both the litigants and the public should be able to rely on our orders, I would not resolve issues in this Queen of Hearts fashion.[1]

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[1] See Lewis Carroll, *Alice's Adventures In Wonderland* (New York: Signet Classic, 2000), ch 12, p 115 (" 'No, no!' said the Queen. 'Sentence first—verdict afterwards.' ").

YOUNG, J. (*concurring in part and dissenting in part*). I concur only in the result of the majority opinion, which holds that defendant, Huron Valley Radiology, P.C. (Huron), is not entitled to dismissal.

I respectfully dissent from the majority's holding that a plaintiff is required to serve a professional corporation not enumerated in MCL 333.20106(1) with a notice of intent to commence a medical malpractice action (NOI) under MCL 600.2912b ("the NOI statute"). Such a defendant is neither a "health professional" nor a "health facility" under the NOI statute; thus, a plaintiff is not required to give that defendant written notice under the NOI statute before commencing a medical malpractice action. I would additionally hold that plaintiff's claim against defendant Huron was tolled pursuant to MCL 600.5856(d) because plaintiff provided an NOI in compliance with the NOI statute for "a claim" that would have been barred during the applicable notice period.

I further dissent from the majority's analysis whether plaintiff's NOI was deficient. The NOI statute requires that the plaintiff provide a statement of "[t]he factual basis for the claim."[1] A necessary factual predicate for a vicarious liability claim is that there is an employer-employee (or other principal-agent) relationship, but such a statement of defendant Huron's relationship to the other individual defendants is not found in plaintiff's NOI; thus, plaintiff's NOI is defective.

As the majority opinion itself demonstrates, it is swiftly becoming increasingly acceptable for this Court to avoid attempting a precise or meaningful statutory analysis in favor of imprecise vagaries and broad pronouncements. Such analyses are favored only by those

[1] MCL 600.2912b(4)(a).

who seek a particular result and cannot find an explicable justification for it. The majority's analysis threatens to render the statutory notice procedure nugatory and undermines, if not overrules, this Court's precedent.[2] I believe that this Court's decisions should be grounded in precise and rigorous analysis of the relevant statutory text and that this Court should avoid creating "inconsistencies among its cases and . . . reduce confusion in [the Court's] jurisprudence by overruling conflicting decisions."[3]

Accordingly, I would reverse the Court of Appeals and hold that defendant is not entitled to dismissal due to plaintiff's defective NOI.

I. PLAINTIFF WAS NOT REQUIRED TO SERVE DEFENDANT HURON, A PROFESSIONAL CORPORATION, WITH AN NOI.

The Court of Appeals held that plaintiff served defendant Huron, a professional corporation, with a defective NOI and that entitled Huron to dismissal. However, only a "health professional" and "health facility" are entitled to notice under the NOI statute, MCL 600.2912b.[4] Thus, a threshold issue is whether defendant Huron is a "health professional" or "health facility." If not, the defect in plaintiff's NOI is rendered moot and does not entitle defendant to dismissal.

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[2] See *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004) (*Roberts II*).

[3] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 571 n 19; 702 NW2d 539 (2005).

[4] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a *health professional* or *health facility* unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis added.]

Because plaintiff has persuasively argued in this Court that defendant Huron is neither a "health professional" nor a "health facility" entitled to notice under the NOI statute, I would hold that plaintiff's defective NOI as to defendant Huron was inconsequential.[5]

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[5] The NOI statute only applies to medical malpractice actions. This is clearly a medical malpractice action, but not for the reasons stated by the majority. Huron is subject to medical malpractice liability because a principal sued for the medical malpractice of its agent is sued in medical malpractice.

The first step when determining whether a plaintiff has alleged medical malpractice is to consider "whether [the claim] is being brought against someone who, or an entity that, is capable of malpractice." *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 420; 684 NW2d 864 (2004). This Court has consistently explained that the accrual statute, MCL 600.5838a, does not define, but rather *expands*, who may be sued for medical malpractice. *Bryant*, *supra* at 420-421; *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008). Here, plaintiff raises a claim of vicarious liability, not direct liability, against defendant Huron. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002).

Michigan courts have consistently recognized actions against a principal in medical malpractice under a vicarious liability theory *when the principal was not identified in the accrual statute* but the agent was subject to medical malpractice liability. See, e.g., *Francisco v Parchment Med Clinic, PC*, 407 Mich 325; 285 NW2d 39 (1979) (vicarious liability action against a professional corporation for medical malpractice of a general practitioner and surgeon *before* the amendment of MCL 600.5838a adding "professional corporation" in 1994, 1993 PA 78); *Becker v Meyer Rexall Drug Co*, 141 Mich App 481; 367 NW2d 424 (1985) (vicarious liability action against a pharmacy, which is not identified in that accrual statute, *Kuznar*, *supra*, for medical malpractice of a pharmacist); *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250; 506 NW2d 562 (1993) (same).

Conversely, this Court has held that vicarious liability claims against corporate entities were stated in ordinary negligence *because* the agent could not be liable in medical malpractice. See *Kambas v St Joseph's Mercy Hosp of Detroit*, 389 Mich 249, 256; 205 NW2d 431 (1979) (decided when the accrual statute did not refer to a "licensed health facility or agency" or otherwise include a hospital, and holding that "[t]he

This Court has previously defined the term "health facility" in the NOI statute through reference to the Public Health Code (PHC),[6] which defines "health facility or agency" as:

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defendant hospital's liability, being herein predicated upon the theory of *respondeat superior*, and having determined that nurses are not subject to the two year malpractice statute of limitations, we conclude that the three year statute of limitations is applicable to injuries arising from the negligent act of a nurse and is equally applicable to defendant employer hospital herein"); *Kuznar*, *supra* at 172 (holding that because the employee could not be liable in medical malpractice, "vicarious liability for [the employee's alleged negligence] by the pharmacy [which is not referenced in § 5838a(1)] may also proceed under the three-year statute of limitations for ordinary negligence"). Thus, when the principal is not identified in the accrual statute, a vicarious liability claim is not automatically an ordinary negligence claim. Rather, the nature of the claim depends on whether the *agent* is sued in medical malpractice.

The nature of the claim against the agent defines the vicarious liability claim. If the agent is sued in medical malpractice, the vicarious liability claim against the principal is in medical malpractice. This *does not* make the principal a "licensed health care professional." MCL 600.5838a(1)(b). It makes the principal *liable* for the acts of a "licensed health care professional."

Here, defendant Huron's agents, defendants Dr. Kristyn Murry and Dr. Richard McLeary, are radiologists subject to medical malpractice liability. There is no dispute that plaintiff's claim sounds in medical malpractice. See *Bryant*, *supra* at 422; *ante* at 414 n 23. Accordingly, plaintiff's vicarious liability claim against defendant Huron is a medical malpractice claim.

[6] See *Omelenchuk v City of Warren*, 461 Mich 567, 571 n 11; 609 NW2d 177 (2000). See also *Bates v Gilbert*, 479 Mich 451, 459; 736 NW2d 566 (2007) (using the definition of "health profession" in the PHC to define that term in MCL 600.2169—expert testimony in medical malpractice actions).

In *Omelenchuk*, the plaintiffs' decedent suffered a heart attack and the plaintiff sued the defendant city and fire department alleging medical malpractice. At issue was whether the plaintiffs' complaint was timely filed in accordance with the various notice periods in the NOI statute. A threshold issue was whether the NOI statute applied to the plaintiffs' claims against the defendants. This Court held that the NOI statute applied because the PHC "defines '[h]ealth facility' to include an 'ambu-

(a) An ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service.

(b) A clinical laboratory.

(c) A county medical care facility.

(d) A freestanding surgical outpatient facility.

(e) A health maintenance organization.

(f) A home for the aged.

(g) A hospital.

(h) A nursing home.

(i) A hospice.

(j) A hospice residence.

(k) A facility or agency listed in subdivisions (a) to (h) located in a university, college, or other educational institution.[7]

Several of the health facilities listed could be incorporated as professional corporations. Significantly, however, defendant Huron, although a professional corporation, is not a listed health facility. Thus, defendant Huron is not a "health facility."

The PHC does not define "health professional." "Professional," however, is commonly defined as "a member of a profession, [especially] one of the learned professions."[8] The PHC defines "health profession" as "a vocation, calling, occupation, or employment *performed by an individual* acting pursuant to a license or registration

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lance operation' . . . [and t]he city of Warren has an ambulance operation." *Omelenchuk*, *supra* at 571 n 11.

[7] MCL 333.20106(1).

[8] *Random House Webster's College Dictionary* (1997). See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language . . . .").

issued under this article."[9] Thus, only an "individual" can practice a "health profession." Because the PHC defines "individual" as "a natural person,"[10] only a natural person can be a "health professional," and defendant Huron is therefore not a "health professional."

Instead of applying these interpretations consistent with our precedent, the majority relies on the definition of "licensed health care professional" in the accrual statute, MCL 600.5838a:[11] "an *individual* licensed or registered under article 15 of the public health code . . .

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[9] MCL 333.16105(2) (emphasis added).

[10] MCL 333.1105(1). See MCL 333.16101(2), which provides that the definitions in MCL 333.1101 *et seq*. are applicable to MCL 333.16105(2).

[11] MCL 600.5838a(1), in pertinent part, provides:

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
>
> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws.
>
> (b) "Licensed health care professional" means an individual licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity. However, licensed health care professional does not include a sanitarian or a veterinarian.

and engaged in the practice of *his or her* health profession in a sole proprietorship, partnership, professional corporation, or other business entity."[12] As stated, a professional corporation is not an "individual."

Interestingly, the majority simply disregards this Court's very recent interpretation of the definition of "licensed health care professional" in the accrual statute. In *Kuznar*, the defendant pharmacy sought the benefit of the shortened period of limitations for medical malpractice and argued that it was subject to medical malpractice liability because it was a "licensed health care professional" under the accrual statute. Just last year, we *unanimously* rejected that argument and explained that "[t]he flaw in defendant's position is that the Public Health Code defines 'individual' to mean 'a natural person.' "[13] The majority's argument here suffers the same flaw that we *unanimously* rejected. A professional corporation is not "a natural person." Furthermore, a professional corporation is not "licensed or registered under article 15 of the public health code." The majority cannot acknowledge the existence of *Kuznar* without overruling it or changing its rationale here. It has therefore chosen to ignore *Kuznar*.

The majority's analysis is superficial. The majority merely announces that it discovered the term "professional corporation" in a related statute and, therefore, a professional corporation is entitled to notice. In serious statutory construction, context matters and so does grammar.

In the accrual statute, "licensed health care professional" is defined by modifying the subject, "an indi-

[12] MCL 600.5838a(1)(b).

[13] *Kuznar*, *supra* at 179, quoting MCL 333.1105(1).

vidual," with the clause "engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity." Thus, instead of providing that a professional corporation is a "licensed health care professional," the statute provides that practice of a health profession in a professional corporation is simply one way for "an individual" to meet the requirements to be a "licensed health care professional."

The context of subsection (1) of the accrual statute also betrays the majority's position. It provides, in pertinent part, that

> a claim based on the medical malpractice of a person . . . who is . . . a licensed health care professional, . . . whether or not the licensed health care professional . . . is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice . . . . [MCL 600.5838a(1).]

Thus, the reference to a professional corporation makes clear that practice in a professional corporation does not affect when a medical malpractice claim accrues.

Moreover, the majority's interpretation is repudiated by the rule of statutory interpretation that prohibits rendering statutory terms surplusage or nugatory.[14] The majority proclaims that "[f]or all practical purposes, the PC and the health care provider are treated as the same entity when professional services are involved."[15] This pronouncement is designed to ignore reality and the actual text of the statute.

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[14] See *Odom v Wayne Co*, 482 Mich 459, 471; 760 NW2d 217 (2008), citing *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006).

[15] *Ante* at 412.

To arrive at its conclusion that a professional corporation is included in the NOI statute, the majority conflates common-law principles with its obligation to accurately construe this statute. It therefore emphasizes the unremarkable proposition of common-law vicarious liability that a corporation can only act through its officers and agents,[16] but ignores the equally unremarkable proposition that a corporation is a distinct legal entity.[17] The flaw in this analysis is that it imports common-law theories of liability to defeat the statutory enumeration of covered entities that does not include a professional corporation.[18] The Legislature is free to include and exclude any entity from the statutory notice procedure that it desires. By importing extra-textual theories of liability into this statutory procedural requirement, the majority deprives the Legislature of that option and renders surplusage portions of the statute the Legislature enacted.

As stated, the majority holds that a professional corporation is a "health professional" because the term "professional corporation" appears in the accrual stat-

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[16] See *Mossman v Millenbach Motor Sales*, 284 Mich 562, 568; 280 NW 50 (1938), citing *Garey v Kelvinator Corp*, 279 Mich 174, 191; 271 NW 723 (1937).

[17] See *Bourne v Sanford*, 327 Mich 175, 191; 41 NW2d 515 (1950) ("[A corporation] is an artificial entity separate and distinct from the holders of its individual stock."), citing *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518; 4 L Ed 629 (1819); *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984) ("We recognize the general principle that in Michigan separate entities will be respected.").

[18] Justice MARKMAN makes the same error. See *post* at 458. Furthermore, my analysis is neither inconsistent with *Kuznar* and the tolling statute nor internally inconsistent. See *post* at 459 n 5. I emphasize that liability and procedure are distinct matters. Here, Huron's *liability* is provided by common law. See note 5 of this opinion. The pertinent *procedure* is provided by statute.

ute definition of "licensed health care provider." That definition, however, also includes any "other business entity." By the majority's logic, any "other business entity" is a "health professional." If that were true, then the terms "health facility" in the NOI statute and "licensed health facility or agency" in the accrual statute would be needless surplusage. For example, a hospital is listed in the PHC definition used to define "health facility" and "licensed health care facility or agency."[19] A hospital may be incorporated and, as such, is any "other business entity." Thus, under the majority's analysis, a hospital is, "for all practical purposes," a "licensed health care professional." The same is true for all other entities listed in the PHC definition of "licensed health facility or agency."[20] Because it renders the term "health facility" in the NOI statute needless surplusage, the majority's interpretation is erroneous.

Because defendant Huron is neither a "health facility" nor a "health professional," I would hold that plaintiff was not required to serve it with an NOI before commencing a medical malpractice action against it.[21] Thus, plaintiff's claim against defendant Huron was not subject to dismissal for a defective NOI.

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[19] See MCL 333.20106(1)(g); *Omelenchuk*, *supra* at 571 n 11; *Kuznar*, *supra* at 177-179.

[20] See MCL 333.20106(1).

[21] Justice MARKMAN contends that my analysis is inconsistent with *Roberts I* and *Roberts II*. *Post* at 459 n 5. Justice MARKMAN is certainly aware that no matter how thoughtful the opinion, we are, as a practical matter, incapable of resolving every potential issue that could conceivably arise in a case. Neither the parties nor this Court raised the issue whether the professional corporation there was required to receive an NOI in *Roberts I* or *Roberts II*. I prefer to base my analysis on issues that we did address rather than consider inferences from issues that we did not and were not asked to address.

II. THE STATUTE OF LIMITATIONS FOR PLAINTIFF'S CLAIM AGAINST DEFENDANT HURON WAS TOLLED UNDER MCL 600.5856(d).

This Court ordered supplemental briefing on "whether, if a defendant professional corporation is not an entity to whom notice is required to be provided under MCL 600.2912b, the applicable statute of limitations, MCL 600.5805(6), was nonetheless subject to statutory tolling provided in former MCL 600.5856(d)."[22] If the statute of limitations was not tolled under former subsection (d) of the tolling statute, MCL 600.5856, then plaintiff's claim against defendant Huron was filed after the period of limitations expired and defendant Huron would be entitled to dismissal with prejudice. I am persuaded that the statute of limitations for plaintiff's claim against Huron was tolled under former subsection (d).

The tolling statute applicable here provided:[23]

> The statutes of limitations or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.
>
> (d) If, during the applicable notice period under section 2912b, *a claim* would be barred by the statute of limitations or repose, for not longer than a number of days equal

[22] 483 Mich 922 (2009).

[23] The tolling statute was amended by 2004 PA 87, effective April 22, 2004.

> to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b. [Emphasis added.]

Plaintiff argues that because subsection (d) uses the indefinite article "a," not the definite article "the," it is not claim specific and, therefore, tolls all claims in the complaint. Defendant argues that tolling only applies for "a claim" to which "*the applicable* notice period under section 2912b" applies.

I believe that the dispositive question is "*what* is being tolled?" The first sentence of the tolling statute states that "[t]he statute*s* of limitations or repose *are* tolled." The plural form suggests that more than one statute of limitations can be tolled by each subsection, including subsection (d).

By their nature, each of the other tolling provisions, § 5856(a) through (c), apply to all claims in a complaint, not just individual claims. Thus, the plural form in the prefatory clause is consistent with those provisions because they could involve multiple statutes of limitations.

Based on the prefatory provision, there is a strong textual argument that under subsection (d), "[t]he statutes of limitations . . . are tolled" for all claims in a complaint when "during the applicable notice period under section 2912b, *a claim* would be barred by the statute of limitations or repose." Thus, for example, in a complaint alleging a malpractice claim and a negligence claim, if the requirements of subsection (d) are met, the "statute*s* of limitations . . . *are* tolled" for both claims. I believe that this is the superior textual argument.

Although the prefatory clause does not specify which statutes of limitations are tolled, there is no textual

basis for restricting tolling to a single claim.[24] Subsection (d) only requires "a claim" to be barred during the notice period and notice to be given in compliance with the NOI statute; the prefatory clause provides that multiple statutes are tolled as a result.[25]

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[24] Justice MARKMAN misconstrues my analysis. I do not suggest that more than one statute of limitations is *always* tolled. *Post* at 469. Certainly, if there is only one claim, then only one statute of limitations is tolled. Nor do I suggest that "all claims against all defendants in Michigan" are tolled by a single sufficient NOI as to a single defendant. *Post* at 472 n 16 (emphasis omitted). Hyperbole aside, I believe that there is simply no textual basis for treating subsection (d) of the tolling statute different than subsection (a) through (c) of the tolling statute. The Legislature is perfectly capable of providing such a basis for distinction; see my discussion of subsection (c) of the tolling statute as amended by 2004 PA 87 below.

[25] I agree with Justice MARKMAN that "the notice of intent must contain all of the statements required by § 2912b(4) as to '*each* particular [defendant] named in the notice.' " *Post* at 470, quoting *Roberts II*, *supra* at 692. Because a plaintiff is statutorily prohibited from commencing a medical malpractice action without first giving the notice required under the NOI statute, dismissal is appropriate when a plaintiff fails to give such notice. See MCL 600.2912b(1); *Burton v Reed City Hosp Corp*, 471 Mich 745, 753; 691 NW2d 424 (2005) (holding that "dismissal is an appropriate remedy for noncompliance with the notice provisions" of the NOI statute). Thus, contrary to Justice MARKMAN's concern that my analysis would deprive defendants the notice that the statutory procedure is designed to provide, *post* at 473-474, a plaintiff's failure to provide a defendant with a sufficient NOI still entitles that defendant to dismissal, tolling notwithstanding.

Justice MARKMAN suggests that I create a "trap for unwary plaintiffs." *Post* at 474 n 19. Admittedly, a plaintiff will be unable to re-file *some* claims—specifically, those for which an NOI is required. However, as I discussed above, a professional corporation that is not a "health facility" is not entitled to notice; thus, a defective NOI is inconsequential for such a defendant. Moreover, if that claim is dismissed, tolling afforded by subsection (d) of the tolling statute is not rendered moot because the plaintiff will not need to wait the notice period to re-file his complaint. It is for this reason that my interpretation does not create an irreconcilable conflict with MCL 600.2912b(6).

I note that the current tolling provision is more precise on this issue. MCL 600.5856(c) provides:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, *the statute is tolled* not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [Emphasis added.]

As indicated by the highlighted text, the significant distinction between current subsection (c) and former subsection (d) is that the current provision restates what is tolled ("the statute"), which specifies that tolling is limited to only one statute while the former provision remained unlimited by the prefatory clause ("[t]he statutes"). Thus, current subsection (c) is expressly claim specific and only tolls "*the* statute" for the previously referenced claim that would be barred.[26]

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[26] Justice MARKMAN correctly states that under my analysis of who must receive an NOI and my interpretation of current subsection (c) of the tolling statute, "the plaintiff would have to file his medical malpractice action against the professional corporation before he filed a medical malpractice action against the physician, if the period of limitations would have expired within 182 days after the plaintiff served his notice of intent on the physician." *Post* at 471 n 14. Although this procedure seems unusual, we are without authority to question the wisdom of the Legislature and "fix" perceived problems. See *State Tax Law Cases*, 54 Mich 350, 360; 20 NW 493 (1884) ("[W]e have no supervisory power in respect to legislation; . . . the law-making power is not responsible to the judiciary for the wisdom of its acts, and . . . , however unwise or impolitic their acts may appear, they must stand as law unless the legislature has plainly overstepped its constitutional authority . . . ."). Moreover, a plaintiff is not prohibited from bringing an action against the principal without naming the agent, *Krolik v Curry*, 148 Mich 214, 223; 111 NW

Here, plaintiff's NOI was sufficient as to co-defendant Murry.[27] Subsection (d) applied to plaintiff's claim against Murry because the period of limitations would have expired during the notice period if the statute of limitations was not tolled. Thus, "notice [was] given in compliance with section 2912b" for "a claim" that "would [have been] barred by the statute of limitations," so "[t]he statutes of limitations . . . [were] tolled." Accordingly, I would reverse the Court of Appeals and hold that defendant Huron was not entitled to dismissal.

III. PLAINTIFF'S NOI WAS DEFICIENT.

I join part III(E) of Justice MARKMAN's dissent[28] regarding the majority's decision to address and resolve an issue that the parties were specifically directed not to address. The majority has deprived the parties of an opportunity to brief and argue the merits of the sufficiency of plaintiff's NOI. As such, the majority's action suggests that parties should follow our grant orders at their peril. No serious court should function in this fashion.

Although not properly before this Court nor pertinent to my analysis, I address the majority's analysis that plaintiff's NOI was not deficient because it will likely affect how lower courts evaluate an NOI. I believe that plaintiff's NOI was deficient and the majority's analysis is no more than a shallow gloss over the statutory text.

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761 (1907); *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294; 731 NW2d 29 (2007); 3 Am Jur 2d, Agency, § 333, p 699, and I fully expect that such actions would be consolidated, see MCR 2.505(A)(2), if the action against the agent proceeds after the notice procedure.

[27] See *Potter v McLeary (On Remand)*, 278 Mich App 279; 748 NW2d 599 (2008).

[28] Specifically, *post* at 476-478 and nn 22 & 23. I also join *post* at 455 n 1.

As stated, a plaintiff must serve an NOI before commencing a medical malpractice action against a health facility or health professional.[29] In subsection (4) of the NOI statute, the Legislature has enumerated six specific topics that the plaintiff must address in his NOI:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

"Subsections 2912b(1) and (4) clearly place the burden of complying with the notice of intent requirements on the plaintiff."[30]

In *Roberts II*, this Court established the standard for whether an NOI complied with the statutory requirements of subsection (4) of the NOI statute: "the claimant is required to make good-faith averments that provide details that are *responsive* to the information

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[29] MCL 600.2912b(1).

[30] *Roberts I*, *supra* at 66.

sought by the statute and that are as *particularized* as is consistent with the early stages of the proceedings."[31] An NOI that does not meet this standard is deficient.

Subsection (a) requires the plaintiff to provide a statement of "[t]he factual basis for the claim." Here, plaintiff has alleged that defendant Huron is vicariously liable for the acts of its agents, defendants Murry, Dr. Richard D. McLeary, and Dr. Gary Augustyn. Thus, "the claim" is vicarious liability. An essential factual predicate for plaintiff's vicarious liability claim is that the individual defendants were defendant Huron's employees. Nowhere in the notice does plaintiff suggest that any employer-employee (or other principal-agent relationship) existed between the defendants.[32] Because plaintiff omitted "[t]he factual basis for the claim," he failed to meet the *Roberts II* standard and, therefore, the NOI is deficient.

The majority holds that there is "no language in [subsection (4) of the NOI statute] that requires a claimant to set forth the nature of the relationship between the parties to be sued."[33] To support its conclusion, the majority states that no such requirement is found in subsection (f).[34] That is true, but no more sufficient than stating that no such requirement is found in subsection (e). The majority offers no discussion of subsection (a)—"[t]he factual basis for the claim"—and why a principal-agent relationship is not part of

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[31] *Roberts II*, *supra* at 701.

[32] As this Court stated in *Roberts II*, "the claimant is not required to craft her notice with omniscience." *Id.* at 691. All that was required of plaintiff was a good-faith averment of the relationship that served as the factual basis for his vicarious liability claim, *Roberts II*, *supra* at 701; the claimant was not required to know the precise employment relationship between the defendants. See *ante* at 422 n 29.

[33] *Ante* at 421.

[34] *Ante* at 421.

the factual basis of plaintiff's vicarious liability claim. The majority proclaims that it is not "necessary to plead facts supporting vicarious liability."[35] As stated, here, "the claim" is vicarious liability. Thus, the majority has proudly announced that it is not necessary to state the factual basis for the claim.[36] This is most likely a relief to plaintiffs and a shock to the Legislature and anyone who has read the NOI statute since it was enacted. The majority cannot square its analysis with the text of the relevant statute, so it does not attempt such folly.

The majority buttresses its conclusion with its assessment of defendant Huron's subjective knowledge: "Certainly they are fully aware of the legal relationship between them."[37] The majority's reliance on the knowledge of *this* defendant is not a relevant assessment of what the Legislature has required a plaintiff to provide in its NOI.

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[35] *Ante* at 422 n 30. I do not contend that the plaintiff must "state the phrase 'vicarious liability.' " *Ante* at 422 n 30. That is a legal theory. Rather, plaintiff must state "[t]he factual basis for the claim." MCL 600.2912b(4)(a).

[36] The majority asserts that subsection (4) of the NOI statute does not require a plaintiff to state facts supporting a vicarious liability claim because the majority has managed to conjure up a way that the Legislature "could have" phrased subsection (4) of the NOI statute. *Ante* at 422 n 30. The Legislature is not required to place the judiciary in checkmate when enacting its policy choices. Rather, it is *our obligation* to "to discern and give effect to the intent of the Legislature . . . by examining the language of the statute itself [because the] words of a statute provide 'the most reliable evidence of its intent . . . .' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). The majority offers no discussion of the meaning of the words actually enacted in subsection (a). Nor does the majority state why an agent-principal relationship is not part of "[t]he factual basis" for plaintiff's vicarious liability claim. The majority reaches its desired result using this faulty analysis and does so mindless of the consequences of its rule by fiat.

[37] *Ante* at 421.

This Court previously rejected such a construction of subsection (4) of the NOI statute for an obvious reason: it would render the statutory notice procedure completely nugatory.[38] The NOI statute, in plain and unambiguous terms, places the burden on the plaintiff to provide "written notice under this section"[39] that "contain[s] a statement"[40] of six specific topics. Thus, the Legislature has not required that the defendant "fill in the blanks." Undeterred, the majority replaces the legislative standards with its own requirement and creates a slippery slope in which the plaintiff complies with the NOI statute by simply declaring "I went to the doctor and something bad happened."[41] Under the majority's analysis, the burden is on the defendant to fill in the remainder of the missing but required NOI information.

The majority fails to comprehend the significance of its decision. Our decisions do not resolve only the case before us, but rather, all cases subsequently filed in Michigan raising similar issues; we are obligated to ensure that all cases are resolved in a manner that is consistent with the text of the applicable statute.[42] Consider, for example, a corporate defendant that never employed or worked with any of the other individual

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[38] See *Roberts II*, *supra* at 696 n 14.

[39] See MCL 600.2912b(1), which provides that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

[40] MCL 600.2912b(4).

[41] *Roberts II*, *supra* at 697 n 15.

[42] See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 66; 718 NW2d 784 (2006), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803) for the fundamental proposition that "ours is to declare what the law is, not what it ought to be."

defendants listed—one that is named in the NOI through mistake or error. How does an NOI that fails to allege any relationship between the corporate defendant and the individual defendants inform that defendant of the factual basis for the claim against it? The majority's analysis threatens to deprive a named defendant of the notice that the statutory procedure is designed to provide.

The justification that a particular defendant might have knowledge about data the plaintiff is statutorily obligated to supply is just a fancy way for the majority to subvert a statute it does not like. At the very least, the majority is not pretending any longer to enforce the plain language of the NOI statute.

The majority's lack of concern for the implications of its discussion is illustrated by its treatment of *Roberts II*. The majority purports to leave for another day the question whether *Roberts II* was correctly decided.[43]

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[43] *Ante* at 424 n 32. It is quickly becoming a new favored practice of the majority to flag decisions of the past decade and invite challenges to those decisions. See *Bush v Shabahang*, 484 Mich 156, 175 n 34; 772 NW2d 272 (2009). It is difficult to reconcile this practice with the majority's previous claims of fidelity to stare decisis. See, e.g., *People v Gardner*, 482 Mich 41, 87; 753 NW2d 78 (2008) (KELLY, J., dissenting) ("Our decision about whether an earlier case must be overruled should be guided by more than a notion that the case was incorrectly decided."); *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (KELLY, J., dissenting) ("[I]f each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our jurisprudence dangerously unstable."); *Devillers*, *supra* at 620 (WEAVER, J., dissenting) ("Under the doctrine of stare decisis, it is necessary to follow earlier judicial decisions when the same points arise again in litigation."); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 278; 731 NW2d 41 (2007) (CAVANAGH, J., dissenting) ("Under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction become precedent and should not be lightly departed. Absent the rarest circumstances, we should remain faithful to established precedent.");

Nevertheless, it states that "the issue is whether [Huron] could reasonably be held to comprehend the nature of the claims being asserted against it."[44] That standard is distinctly *not* the *Roberts II* standard set out above. Indeed, that standard is similar to the standard articulated by the *dissent* in *Roberts II*: "The statement simply must provide notice of a potential claim sufficient to allow potential defendants to ascertain the basis for the claim and enter into settlement discussions."[45] Once again, such a view is inconsistent with the statutory text.

This continues a disturbing trend in which the majority

> overrules by indirection, or at least leaves the impression that it is doing so, thereby sowing the seeds of confusion and making it difficult for the citizens of this state to comprehend precisely what our caselaw requires. This appears to be an unfortunate return to our predecessors' past practice of "frequently pa[ying] little attention to the

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People v Hawkins, 468 Mich 488, 517-518; 668 NW2d 602 (2003) (CAVANAGH, J., dissenting) (" 'We have overruled precedents when the intervening developments of the law has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." Absent those changes or compelling evidence bearing on Congress' original intent, our system demands that we adhere to our prior interpretations of statutes.' "), quoting *Patterson v McLean Credit Union*, 491 US 164, 173; 109 S Ct 2363; 105 L Ed 2d 132 (1989) (citations omitted). See also Todd C. Berg, *Hathaway Attacks*, Michigan Lawyers Weekly, October 27, 2008, in which Justice HATHAWAY was quoted: "I believe in stare decisis. Something must be drastically wrong for the court to overrule."; *Lawyers' Election Guide: Judge Diane Marie Hathaway*, Michigan Lawyers Weekly, October 30, 2006, in which Justice HATHAWAY, then running for a position on the Court of Appeals, was quoted: "Too many appellate decisions are being decided by judicial activists who are overturning precedent."

[44] *Ante* at 425.

[45] *Roberts II*, *supra* at 713-714 (KELLY, J., dissenting).

> inconsistencies among its cases and declin[ing] to reduce confusion in [the Court's] jurisprudence by overruling conflicting decisions."[46]

IV. CONCLUSION

I do not believe that defendant Huron is a "health professional" or "health facility" entitled to notice under the NOI statute and, therefore, plaintiff was not required to serve defendant Huron with an NOI. I also believe that plaintiff's claim against defendant Huron was tolled pursuant to subsection (d) of the tolling statute. Accordingly, I would reverse the Court of Appeals and hold that defendant Huron is not entitled to dismissal because of plaintiff's defective NOI.

MARKMAN, J. (*concurring in part and dissenting in part*). I agree with the majority that plaintiff's notice of intent was sufficient with regard to defendant Kristyn Murry and that defendant Huron Valley Radiology, P.C. (HVR) was entitled to a notice of intent. However, I disagree that the notice of intent was sufficient with regard to HVR. The notice of intent did not contain a statement of "[t]he applicable standard of practice or care alleged by the claimant" with regard to HVR, as is required by MCL 600.2912b(4)(b). As this Court explained in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 693-694; 684 NW2d 711 (2004) (*Roberts II*), a notice of intent must include a "particularized standard for each of the professionals and facilities named in the notices," which necessarily must indicate "whether plaintiff [is] alleging that [the] defendants were vicariously or directly liable to [the plain-

[46] *Beasley v Michigan*, 483 Mich 1025, 1030 (2009) (CORRIGAN, J., dissenting), quoting *Devillers*, *supra* at 571 n 19.

tiff]." Because the notice of intent here did not include such a statement, it was clearly defective with regard to HVR.

We held in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002) (*Roberts I*), that a defective notice of intent does not toll the statute of limitations. Because the period of limitations in a medical malpractice action is two years, MCL 600.5805(6), and because the alleged malpractice in this case occurred on June 7, 2001, and the complaint was not filed until November 4, 2003, the complaint was untimely filed, and thus the action against HVR is barred by the statute of limitations. I would affirm the portions of the Court of Appeals opinion that held that the notice of intent was sufficient as to defendant Murry and insufficient as to defendant HVR, but reverse the portions of that opinion that held that the defective notice of intent tolled the statute of limitations and, thus, that a dismissal without prejudice was appropriate. The action against HVR should be dismissed with prejudice.

I. FACTS AND HISTORY

The alleged medical malpractice occurred on June 7, 2001. Plaintiff alleges that Murry, a radiologist working for HVR, "failed to properly interpret and report back the true and correct results of the MRI . . . ." He further alleges "[t]hat as a result of the . . . delay in surgical [intervention, he] has suffered permanent neurologic injury and deficit." On May 30, 2003, just eight days before the expiration of the two-year period of limitations, plaintiff served defendants Murry and HVR with a notice of intent to file suit. On November 4, 2003, plaintiff filed his medical malpractice complaint against defendants.

The trial court denied defendants' motion for summary disposition. The Court of Appeals reversed, concluding that because plaintiff's affidavits of merit were defective, the complaint had to be dismissed with prejudice. *Potter v McLeary*, 274 Mich App 222; 732 NW2d 600 (2007). This Court reversed "the portion of the judgment of the Court of Appeals dismissing the complaint *with* prejudice, because the dismissal should have been *without* prejudice as to the affidavit of merit issue." *Potter v McLeary*, 480 Mich 915 (2007) (emphasis in the original). We remanded to the Court of Appeals for consideration of defendants' remaining issues. On remand, the Court of Appeals held that plaintiff's notice of intent was sufficient as to defendant Murry, but insufficient as to defendant HVR. However, the Court of Appeals held that the defective notice of intent tolled the statute of limitations, and thus dismissed without prejudice as to HVR. *Potter v McLeary*, 278 Mich App 279; 748 NW2d 599 (2008).

In Docket No. 136336, plaintiff appealed the portion of the Court of Appeals decision that held that the notice of intent was defective as to HVR, and in Docket Nos. 136338 and 136339, defendants appealed the portion of the Court of Appeals decision that held that the defective notice of intent tolled the statute of limitations, and, thus, that a dismissal without prejudice was appropriate, and the portion that held that the notice of intent was sufficient as to defendant Murry. In Docket No. 136336, we granted plaintiff's application "limited to the issue whether defendant Huron Valley Radiology, P.C., is a 'health facility or agency' to which a plaintiff is required to provide notice under MCL 600.2912b(1)." 482 Mich 1004 (2008). In Docket Nos. 136338 and 136339, we held defendants' application for leave to appeal in abeyance pending the decision in Docket No.

136336. 756 NW2d 85 (2008).[1] Subsequently, in Docket No. 136336, we directed the parties to file supplemental briefs addressing "whether, if a defendant professional corporation is not an entity to whom notice is required to be provided under MCL 600.2912b, the applicable statute of limitations, MCL 600.5805(6), was nonetheless subject to statutory tolling provided in former MCL 600.5856(d)." 483 Mich 922 (2009).

II. STANDARD OF REVIEW

"Questions of statutory interpretation are questions of law that this Court reviews de novo." *People v*

[1] Despite this abeyance, and despite the fact that the parties have not been given an opportunity to brief or argue the issues raised in defendants' application for leave to appeal (Docket Nos. 136338 and 136339), or even, given this Court's limited grant order, the issue raised in plaintiff's application for leave to appeal (the sufficiency of the notice of intent as to HVR), the majority addresses the issue raised in plaintiff's application and one of the issues raised in defendants' application (the sufficiency of the notice of intent as to Murry), and then announces that it is now denying defendants' application. Only because the majority addresses these issues in its opinion today do I also address these. Contrary to the majority's contention, *ante* at 409, neither one of the parties argued the sufficiency of the notice of intent in their briefs filed after this Court granted plaintiff's application limited to a different issue, and only the plaintiff briefly raised the sufficiency issue at oral arguments; defendants did not say anything at all regarding the issue (which was to be expected given that this Court had not granted leave on that issue). The majority contends that "[d]efendant [HVR] addressed the sufficiency of the NOI issue extensively in its brief on appeal." *Ante* at 409 n 8. However, page one of defendant's brief states, "This brief concerns the singular issue of whether Appellee, HVR, is entitled to pre-suit notice pursuant to MCL 600.2912b(1)." The only mention thereafter regarding the sufficiency issue is in the "procedural history" section in which defendant describes its bases for its motion for summary disposition. There is no discussion of the sufficiency issue in defendant's "Argument" section of its brief. Finally, contrary to the majority's contention, *ante* at 409 n 8, defendant's prayer for relief does not "ask[] us to decide the remaining issues in plaintiff's application for leave to appeal." Instead, defendant expressly states that "Plaintiff-Appellant's Application For Leave To Appeal should be denied."

Swafford, 483 Mich 1, 7; 762 NW2d 902 (2009). A trial court's determination regarding a motion for summary disposition is also reviewed de novo. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

III. ANALYSIS

A. NOTICE OF INTENT

I agree with the majority that HVR was entitled to a notice of intent. The majority concludes that HVR was entitled to a notice of intent because "the action is one sounding in medical malpractice." *Ante* at 403. Although I agree that the action here is "one sounding in medical malpractice," this is only the first step in the analysis to determine whether a notice of intent was required.

MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

Because § 2912b(1) only applies to an "action alleging medical malpractice," the majority is correct that "the first step in the analysis" is to determine whether the action is one "alleging medical malpractice." *Ante* at 414. It is undisputed that the action at issue here is such an action, because it "allege[s] an action that (1) occurred within the course of a professional relationship and (2) poses questions of medical judgment outside the realm of common knowledge and experience." *Kuznar v Raksha Corp*, 481 Mich 169, 176-177; 750 NW2d 121 (2008), citing

Bryant v Oakpointe Villa Nursing Ctr, Inc, 471 Mich 411, 422; 684 NW2d 864 (2004).[2]

However, despite the majority's initial recognition that whether this action is one "alleging medical malpractice" is only the "first step in the analysis" in determining whether a notice of intent was required, *ante* at 414, the majority does not address the second step. Rather, it concludes that "[b]ecause § 2912b(1) clearly requires a claimant to provide a timely NOI before commencing a medical malpractice action, plaintiff was required to provide this [professional corporation] with a timely NOI." *Ante* at 419. However, § 2912b(1) requires a notice of intent only if: (a) the action is one "alleging medical malpractice"; *and* (b) the defendant is a "health professional or health facility." Despite this clear language, the majority does not address whether HVR is a "health professional or health facility."[3]

Nevertheless, I believe that HVR is a "health professional" for the purposes of § 2912b. I reach this conclusion on the basis that plaintiff is seeking to hold HVR vicariously liable for its employee's alleged malpractice and such employee is unquestionably a "health professional." In *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002), this Court explained that

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[2] In the instant case, the services provided were unquestionably professional services rendered by a licensed health care professional, i.e., a radiologist, and thus the claims at issue here allege an action that occurred in the course of a professional relationship. I agree with Justice YOUNG that HVR is "subject to medical malpractice liability because a principal sued for the medical malpractice of its agent is sued in medical malpractice." *Ante* at 433 n 5.

[3] I agree with Justice YOUNG, *ante* at 437, 440, that the majority errs in concluding that HVR is entitled to a notice of intent simply because the words "professional corporation" can be found in MCL 600.5838a. I also agree with him, *ante* at 435, that HVR is not a "health facility" because it is not a clinical laboratory, a hospital, a nursing home, or any other type of facility listed in MCL 333.20106(1).

under the principle of vicarious liability, "the principal 'is only liable because the law creates a practical identity with his [agents] . . . .' " (Citation omitted.) Subsequently, in *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 391-392; 668 NW2d 628 (2003), on remand from this Court for reconsideration in light of *Cox*, the Court of Appeals explained:

> For all practical purposes the hospital stands in the shoes of its agents (the doctors).
>
> Thus, we opine that with regard to vicarious liability, medical-malpractice law applicable to a physician is also applicable to the physician's hospital. . . . All procedural requirements are applicable to the hospital in the same manner and form as [they are to] the doctor . . . . This is so because the law creates a practical identity between a principal and an agent . . . .
>
> . . . Vicarious liability imposes a legal fiction on defendant hospital providing that the principal is only liable because the law creates a practical identity with its agents . . . . The law treats the principal and the agent as sharing a single identity . . . .[4]

Because, with regard to vicarious liability, "[t]he law treats the principal and the agent as sharing a single identity," and because, in the instant case, plaintiff is seeking to hold HVR vicariously liable for its employee's alleged malpractice, and because such employee is unquestionably a "health professional" entitled to a notice of intent, the law treats HVR as also being a "health professional" entitled to a notice of intent.[5] Therefore,

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[4] After the Court of Appeals rendered its decision on remand from this Court, this Court denied leave to appeal. 469 Mich 1005 (2004).

[5] Justice YOUNG concludes that the action against HVR is a medical malpractice action because plaintiff is seeking to hold HVR vicariously liable for the actions of one of its employees who is a health professional, but then overlooks vicarious liability in terms of determining whether HVR is entitled to a notice of intent. Because a medical malpractice

plaintiff was required to provide a notice of intent to HVR before commencing a medical malpractice action in accordance with § 2912b.

B. SUFFICIENCY

As discussed above, § 2912b(1) provides, "a person *shall not* commence an action alleging medical malpractice against a health professional or health facility

action can only be brought against " 'a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency' who is engaging in or otherwise assisting in medical care and treatment," *Kuznar*, 481 Mich at 177, quoting in part MCL 600.5838a(1), either Justice YOUNG's position is inconsistent with *Kuznar* and § 5838a(1) or it is internally inconsistent. That is, pursuant to *Kuznar*, Justice YOUNG must determine that HVR is a "health professional" in order to conclude that this is a medical malpractice action; however, if he were to determine that HVR *is* a "health professional" for purposes of concluding that HVR can be sued for medical malpractice, he could not then also determine that HVR is *not* a "health professional" for purposes of concluding that HVR is not entitled to a notice of intent. It simply cannot be both ways. If HVR is subject to a medical malpractice action on the basis of vicarious liability, HVR is entitled to a notice of intent on the basis of vicarious liability. Contrary to Justice YOUNG's contention, *ante* at 437, concluding that HVR is a "health professional" for purposes of § 2912b because plaintiff is seeking to hold HVR vicariously liable for the actions of one of its employees who is unquestionably a "health professional," is not inconsistent with *Kuznar*'s conclusion that the defendant pharmacy in that case was not a "health professional" because in *Kuznar* the plaintiff was seeking to hold the pharmacy vicariously liable for the actions of one of its employees who was unquestionably *not* a "health professional." That is, *Kuznar* did not involve the kind of case that we are dealing with here, in which the plaintiff is seeking to hold the defendant vicariously liable for the actions of its employee, who *is* unquestionably a "health professional." Indeed, Justice YOUNG's position is inconsistent with prior caselaw. See, for example, *Roberts I*, 466 Mich at 59, and *Roberts II*, 470 Mich at 693, in which this Court held (in thoughtful opinions authored by Justice YOUNG) that because the plaintiff's notice of intent was defective as to the professional corporation, the statute of limitations was not tolled. Why would it matter that the notice of intent was defective as to the professional corporation if a professional corporation is never entitled to a notice of intent in the first place?

unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." (Emphasis added.) MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section *shall* contain a statement of at least *all* of the following:
>
> (a) The factual basis for the claim.
>
> (b) *The applicable standard of practice or care alleged by the claimant*.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. [Emphasis added.]

In *Roberts II*, 470 Mich at 700-701, this Court explained:

> Under MCL 600.2912b(4), a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant will evolve as discovery and litigation proceed, the claimant is required to . . . provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings. . . . This is not an onerous task: all the claimant must do is specify what it is that she is *claiming* under each of

> the enumerated categories in § 2912b(4). Although there is no one method or format in which a claimant must set forth the required information, that information must, nevertheless, be specifically identified in an ascertainable manner within the notice. [Emphasis in the original.]

In *Roberts II*, the plaintiff brought a medical malpractice action against a hospital, a professional corporation, an obstetrician, a physician's assistant, and an emergency room physician. This Court held that the plaintiff must "aver the specific standard of care that she *is claiming* to be applicable to each particular professional or facility that is named in the notice." *Id.* at 692 (emphasis in the original). Because the notice of intent "fail[ed] to indicate whether plaintiff was alleging that these defendants [the hospital and professional corporation] were vicariously or directly liable to her," the plaintiff's notice of intent failed to allege "a standard specifically applicable to the defendant facilities . . . ." *Id.* at 693. For this reason, *Roberts II* held that the notice of intent was insufficient as to the defendant hospital and the defendant professional corporation.

In the instant case, the Court of Appeals similarly held that the notice of intent was insufficient as to HVR because it did not state the applicable standard of practice or care as is required by § 2912b(4) through (b).[6] I agree. The notice of intent completely fails to indicate what standard of practice or care plaintiff believes is appli-

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[6] Defendant Murry argues that the notice of intent does not satisfy the requirements set forth in § 2912b(4)(b) through (d). Although I agree with the majority that the notice of intent is sufficient as to defendant Murry, I cannot say that I agree with the majority's analysis because it provides none. In my judgment, the notice of intent does satisfy § 2912b(4)(b) because it states, "The standard of care required Dr.[] Murry . . . to correctly read, interpret and report the correct results to the emergency room under the circumstances." In addition, the notice of intent does satisfy § 2912b(4)(c) and (d) because it states that defendant Murry

cable to defendant HVR, and it does not indicate whether plaintiff is alleging that defendant HVR is directly or vicariously liable to him. Indeed, as the Court of Appeals held, "[t]he standard of care completely fails to make any reference to defendant Huron Valley Radiology." *Potter*, 278 Mich App at 284. In fact, the notice of intent as a whole only references HVR twice: once on the first page where it lists the health care professionals and entities to whom the notice of intent is intended to apply, and then again on the last page, where it lists the health care professionals and entities being notified of the action. Because the notice of intent does not contain a statement indicating what standard of practice or care is allegedly applicable to HVR, as is required by § 2912b(4)(b), I agree with the Court of Appeals that the notice of intent is insufficient as to defendant HVR.

Although the majority "question[s] whether *Roberts II* was correctly decided," *ante* at 424 n 32,[7] it does not expressly overrule *Roberts II* because it concludes that this decision is not "dispositive." It is not dispositive,

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"failed to properly interpret the MRI images and convey accurate information to the emergency room physicians in charge of the patient that night."

[7] Specifically, the majority "question[s] whether *Roberts II* was correctly decided because it adds a requirement not found in the language of the statute; namely, that statements be 'particularized.' " *Ante* at 424 n 32. Despite the fact then that § 2912b(1) clearly requires a notice of intent to be sent to each defendant, and § 2912b(4) clearly requires the notice of intent to contain certain statements, the majority apparently would prefer to conclude that the notice of intent is not required to contain each of these statements as to each defendant. For example, the majority apparently would hold that if a plaintiff sues both a nurse and a physician for their own direct malpractice, as long as the notice of intent contains the required "applicable standard of practice or care statement" as to the nurse, the notice would be sufficient as to the physician as well. Fortunately, the majority leaves this issue for another day, one that hopefully will not arrive soon.

says the majority, because "*Roberts II* opined that because there was confusion with regard to whether the claim was for direct or vicarious liability, the [professional corporation] was unable to understand the nature of the claims being asserted," but, "[i]n the case before us, no such potential for confusion exists . . . ." *Ante* at 424 n 32. First, that is not what *Roberts II* held; rather, it held, 470 Mich at 693, 702, that because the plaintiff's notice of intent did not include a statement "indicat[ing] whether plaintiff was alleging that these defendants were vicariously or directly liable to her," "plaintiff did not fulfill her obligation under § 2912b . . . ." Second, as with *Roberts II*, a "potential for confusion," *ante* at 424 n 32, *does* exist here because HVR could be sued on the basis of either direct or vicarious liability, or both, and the notice of intent does not indicate on which basis plaintiff intended to sue HVR.

Furthermore, that *Roberts II* involved a situation in which the notice of intent may have implied that the plaintiff was seeking to hold the defendants directly liable, while the complaint implied that the plaintiff was seeking to hold the defendants vicariously liable, whereas in the instant case nothing can be implied from plaintiff's notice of intent regarding direct or vicarious liability, while the complaint seeks to hold HVR vicariously liable, is a distinction utterly without any significance in this case. The issue here is whether the *notice of intent* was sufficient as to HVR. Being a professional corporation, HVR could be sued on the basis of either direct liability or vicarious liability. See *Cox*, 467 Mich at 11, stating that "[a] hospital may be 1) directly liable for malpractice, through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff, or 2) vicariously liable for the negligence of its agents." MCL 600.2912b(4)(b) requires the notice of intent to contain a statement of "[t]he

applicable standard of practice or care alleged by the claimant." Obviously, the "applicable standard of practice or care" would depend on whether the claimant is suing the professional corporation on the basis of direct liability or vicarious liability. Accordingly, a notice of intent must indicate whether the claimant is suing the professional corporation on the basis of direct liability, vicarious liability, or both.

The majority holds that "when vicarious liability is the only claim asserted," it is unnecessary to "specifically set forth the legal theory of vicarious liability within the [notice of intent]." *Ante* at 422. However, if the notice of intent does not indicate that the plaintiff is planning on suing the defendant professional corporation on the basis of vicarious liability, how will the defendant know that "vicarious liability is the only claim asserted"? The majority fails to recognize that the whole point of the exercise of a notice of intent is to apprise the defendant of the claims that the plaintiff plans to bring *before* a complaint is filed. Here, because the notice of intent was silent on the subject, HVR did not know until plaintiff filed his complaint that plaintiff was suing on the basis of vicarious liability. That is, HVR did not know what "standard of practice or care" plaintiff was alleging that HVR breached until plaintiff filed his complaint against HVR. This is most clearly a violation of § 2912b(4)(b).[8]

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[8] The majority concludes that HVR's claim that plaintiff's notice of intent was defective because it did not indicate whether plaintiff was planning on suing HVR on the basis of direct or vicarious liability is "troubling" because HVR "openly admits knowing and understanding that it is vicariously liable for the actions of its employee, Dr. Murry." *Ante* at 423. What I find to be "troubling" instead is that the majority ignores the significant distinction between (a) knowing and understanding that a professional corporation *may* be held vicariously liable for the actions of its employees; and (b) knowing and understanding that someone is planning on bringing a cause of action against the profes-

The majority misunderstands the issue. Contrary to its contention, *ante* at 425, the issue is not whether HVR "could reasonably be held to comprehend the nature of the claims being asserted against it." Instead, as Justice YOUNG explains, *ante* at 446-447, the issue is whether the notice of intent " 'provide[s] details that are *responsive* to the information sought by the statute . . . .' " *Ante* at 446-447, quoting *Roberts II*, 470 Mich at 701 (emphasis in the original). More specifically, the issue here is whether the notice of intent contains a statement of "[t]he applicable standard of practice or care alleged by the claimant," as is required by § 2912b(4)(b). *Boodt v Borgess Med Ctr*, 481 Mich 558, 560-561; 751 NW2d 44 (2008) ("Although the instant notice of intent may conceivably have apprised [defendant] of the nature and gravamen of plaintiff's allegations, this is not the statutory standard; § 2912b(4)[b] requires something more."). Because the notice of intent at issue here did not contain a statement of the "applicable standard of practice or care" with regard to HVR, the notice of intent did not comply with § 2912b(4)(b).[9]

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sional corporation to hold that corporation vicariously liable for the actions of its employees. The majority erroneously equates knowledge of potential liability with knowledge of an imminent lawsuit.

[9] Although neither the parties nor the lower courts addressed this issue, the majority concludes that § 2912b does not "require[] a claimant to set forth the nature of the relationship between the parties to be sued." *Ante* at 421. While I agree with the majority, *ante* at 421 n 28, that the notice need not allege the "precise nature of the relationship," i.e., whether there is an "actual employment relationship with the [professional corporation] or . . . a complex independent contractor arrangement," the majority fails to recognize that § 2912b(4)(a) *does* require the notice of intent to contain a statement of the "factual basis for the claim." In this case, plaintiff sued multiple physicians, multiple professional corporations, and a hospital. Yet, plaintiff's notice of intent nowhere includes a "factual basis for the claim" against HVR. That is, the notice of intent does not even indicate that the reason that HVR is being sued is because HVR is where Murry was working at during the time of the alleged malpractice. Because

C. TOLLING

The period of limitations in medical malpractice cases is two years. MCL 600.5805(6). At the time the complaint was filed in this case, MCL 600.5856, in pertinent part, provided:

> The statutes of limitations or repose are tolled:
>
> * * *
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given *in compliance with section 2912b*. [Emphasis added.][10]

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§ 2912b(4)(a) requires the notice of intent to include the "factual basis for the claim," and the notice of intent at issue here did not include the fact that Murry was working at HVR at the time of the alleged malpractice, which, indeed, is one of the most important facts in a case in which the claim is based on vicarious liability, I also agree with Justice YOUNG, *ante* at 447, that plaintiff's notice of intent fails to satisfy § 2912b(4)(a). Contrary to the majority, *ante* at 422 n 29, summarily naming "Huron Valley Radiology as well as the three individual physicians and 'their employees or agents, actual or ostensible, thereof' " in the notice of intent does not indicate what the "factual basis for the claim" is. Because I believe that the notice of intent does not satisfy the requirements set forth in § 2912b(4)(a) and (b), there is no need to address whether the notice of intent satisfies the other requirements of § 2912b(4), and the only reason that I even address § 2912b(4)(a) is to respond to the majority's incorrect conclusion that § 2912b(4) does not "require[] a claimant to set forth the nature of the relationship between the parties to be sued." *Ante* at 421.

[10] The Legislature has since amended § 5856. However, because plaintiff's complaint was filed (on November 4, 2003) before the effective date of this amendment (April 22, 2004), it has no effect on the instant case. See 2004 PA 87, enacting section 1(1) ("[T]his amendatory act applies to civil actions filed on or after the effective date of this amendatory act."). For a discussion of the amended version of § 5856, see *Bush v Shabahang*, 484 Mich 156, 189-193; 772 NW2d 272 (2009). (MARKMAN, J., dissenting).

In *Roberts I*, 466 Mich at 59, this Court held that "the statute of limitations cannot be tolled under MCL 600.5856(d) unless notice is given in compliance with all the provisions of MCL 600.2912b."[11] As *Roberts I*, 466 Mich at 64, explained, "Section 5856(d) clearly provides that notice must be compliant with § 2912b . . . ." "As a result, the tolling of the statute of limitations is available to a plaintiff only if all the requirements included in § 2912b are met." Section 2912b(4) states that the notice of intent "*shall* contain a statement of at least *all* of the following . . . ." (Emphasis added.) The term "shall" "denote[s] a mandatory, rather than discretionary action." *Roberts I*, 466 Mich at 65. The term "all" exemplifies that each and every one of the statements required by § 2912b(4)(a) through (f) must be contained in the notice of intent. Therefore, only a notice of intent that is "in compliance with section 2912b" tolls the statute of limitations and a notice of intent must contain all of the statements required by § 2912b(a) through (f) in order to be "in compliance with section 2912b."

Because, as discussed earlier, the notice of intent in this case does not contain the statements required by § 2912b(4)(a) and (b) with regard to HVR, it is not "in compliance with section 2912b." Because the notice of intent is not "in compliance with section 2912b," the notice of intent does not toll the statute of limitations. And because the period of limitations in a medical malpractice action is two years, MCL 600.5805(6), and the alleged malpractice in this case occurred on June 7, 2001, and the complaint was not filed until November 4,

[11] This portion of *Roberts I* was decided unanimously with even the dissenting justices agreeing that "to begin the tolling of the . . . statute of limitations, a plaintiff must fully comply with the requirements of MCL 600.2912b. Compliance with the delivery provision of the notice statute alone is insufficient." *Roberts I*, 466 Mich at 72 (KELLY, J., dissenting).

2003, the complaint was untimely filed, and the action against HVR is barred by the statute of limitations. Therefore, the action against HVR should be dismissed with prejudice.

The Court of Appeals relied on *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), to support its conclusion that a defective notice of intent tolls the statute of limitations, and thus a dismissal without prejudice is appropriate. However, this case is significantly distinguishable from *Kirkaldy*. In *Kirkaldy*, 478 Mich at 586, this Court held that the filing of a complaint and a defective affidavit of merit tolls the statute of limitations until the affidavit of merit is successfully challenged. This is so because nothing in MCL 600.5856(a), which provides for tolling upon the filing of a complaint,[12] or MCL 600.2912d, which requires an affidavit of merit to be filed with a complaint,[13] limits tolling to an affidavit that is in compliance with § 2912d. However, § 5856(d) *does* limit tolling to a notice of intent that is "in compliance with section 2912b." Therefore,

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[12] The amended version of MCL 600.5856 provides, in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

[13] MCL 600.2912d(1) provides, in pertinent part:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following . . . .

while the filing of a complaint and a defective affidavit of merit may toll the statute of limitations, the serving of a defective notice of intent does not.

Justice YOUNG contends that the statute of limitations was tolled with regard to HVR because, although the notice of intent was insufficient as to HVR, it was sufficient as to defendant Murry. That is, he concludes that as long as a notice of intent is sufficient as to *one* of the defendants, the statute of limitations is tolled as to *all* of the defendants. I respectfully disagree.

As discussed above, § 5856 provided at the time of the filing of the complaint, in pertinent part:

> The statutes of limitations or repose are tolled:
>
> * * *
>
> (d) If during the *applicable notice period under section 2912b*, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the *applicable notice period* after the date *notice is given in compliance with section 2912b*. [Emphasis added.]

Justice YOUNG is correct that § 5856 does indicate that "more than one statute of limitations can be tolled . . . ." *Ante* at 442. For example, if multiple defendants receive a notice of intent that is sufficient as to all of them, all of their statutes of limitations are tolled. However, this does not mean that "more than one statute of limitations" is *always* tolled. Obviously, if there is only one defendant, only one statute of limitations would be tolled, and such a conclusion is not contrary to the reference in § 5856 to the "statutes of limitations." See MCL 8.3b, which provides that "every word importing the plural number may be applied and limited to the singular number." Similarly, concluding that a notice of intent only tolls the statute of limita-

tions that applies to the defendant who has actually received a sufficient notice of intent, but not the statute of limitations that applies to the defendant who has *not* received such a notice, is also not inconsistent with the reference in § 5856 to the "statutes of limitations." Further, such a conclusion is required by the reference in § 5856(d) to "the applicable notice period under section 2912b," and "the applicable notice period after the date notice is given in compliance with section 2912b," because there is no "applicable notice period under section 2912b," if the notice of intent is not "in compliance with section 2912b."

As discussed earlier, § 2912b states, in pertinent part:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.
>
> * * *
>
> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following . . . .

Accordingly, as this Court held in *Roberts I*, 466 Mich at 64, a notice of intent only tolls the statute of limitations if the notice contains *all* the statements required by § 2912b(4). In addition, as this Court held in *Roberts II*, 470 Mich at 692, the notice of intent must contain all of the statements required by § 2912b(4) as to "*each* particular [defendant] named in the notice." (Emphasis added.) That is, the notice of intent only tolls the statute of limitations as to each particular defendant if the notice contains all the statements required by § 2912b(4) as to each particular defendant. Thus, if a

notice of intent contains all the required statements as to the defendant physician, but does not contain all the required statements as to the defendant professional corporation, the statute of limitations would only be tolled as to the defendant physician because a notice "in compliance with section 2912b" has not been served on the defendant professional corporation and thus there is no "applicable notice period" as to the defendant professional corporation.

Contrary to Justice YOUNG's contention, § 5856(d)'s reference to "a claim" does not alter the outcome.[14] The language "a claim" must be read in context. To *which* "claim" is § 5856(d) referring? When § 5856(d) is read in its entirety, it is clear that the "claim" to which it is referring is the "claim" that "would be barred by the statute of limitations" "during the applicable notice period under section 2912b." However, "a claim" would

[14] Although Justice YOUNG relies on the language "a claim," this same language is found in the amended version of § 5856, and yet he recognizes that, under the amended version, the notice of intent has to be sufficient as to all the defendants in order to toll all their statutes of limitations. See *ante* at 443-444. In light of his view that a professional corporation that is not a "health facility" is not entitled to a notice of intent, combined with his view that the amended version of § 5856 only tolls the statute of limitations if the defendant has received a sufficient notice of intent, Justice YOUNG apparently would conclude that a notice of intent that is sufficient as to the defendant physician would toll the statute of limitations as to the defendant physician, but would not toll the statute of limitations as to the defendant professional corporation. Under this view, a plaintiff would have to serve the defendant physician with a notice of intent and wait 182 days to file suit against the defendant physician, but the plaintiff would have to go ahead and file suit against the defendant professional corporation before the period of limitations expired as to that corporation since the corporation would not be entitled to notice of intent tolling. Therefore, the plaintiff would have to file his medical malpractice action against the professional corporation before he filed a medical malpractice action against the physician, if the period of limitations would have expired within 182 days after the plaintiff served his notice of intent on the physician.

not be "barred by the statute of limitations" "during the applicable notice period under section 2912b" where a sufficient notice of intent had not yet been served upon the defendant. Where a sufficient notice of intent had not yet been served upon the defendant, there would be no "applicable notice period under section 2912b" and, thus, there would be no claim that would be "barred by the statute of limitations" "during the applicable notice period."[15] Because I believe that "a claim" in § 5856(d) is referring to "a claim" that would be "barred by the statute of limitations" "during the applicable notice period," and the claim against HVR would not have been "barred by the statute of limitations" "during the applicable notice period" (because there was no "applicable notice period"), I conclude that the statute of limitations was not tolled as to plaintiff's claim against HVR.[16]

Moreover, under Justice YOUNG's analysis, although HVR is not even entitled to a notice of intent because it is a professional corporation, he would hold that under § 5856(d) a notice of intent that does not comply with § 2912b tolls the statute of limitations applicable to

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[15] For further discussion of this point, see my dissenting opinion in *Bush*, 484 Mich at 192-193.

[16] Justice YOUNG concludes that "there is no textual basis for restricting tolling to a single claim." *Ante* at 442-443. However, under his interpretation, there would also seem to be no basis to limit tolling to only those claims relating to the plaintiff's medical malpractice action. In other words, the statutes of limitations for *all* claims against *all* defendants in Michigan would seem to be tolled as long as one plaintiff files a proper notice of intent with one defendant. This could hardly have been the intent of the Legislature. Contrary to Justice YOUNG's contention, *ante* at 443 n 24, there *is* a "textual basis for treating subsection (d) of the tolling statute differently than subsection (a) through (c) of the tolling statute." That is, as discussed above, subsection (d), unlike subsections (a) through (c), limits tolling to "a claim [that] would be barred by the statute of limitations" "during the applicable notice period" if it were not for the "notice [that] is given in compliance with section 2912b."

HVR. That is, he concludes that, although HVR is not entitled to a notice of intent, plaintiff still gets the benefit of notice of intent tolling. This conclusion, in which the defendant is denied the benefit of a notice of intent, and yet the plaintiff is afforded the benefit of an extended period of limitations, is illogical and inconsistent with the statute.[17] The whole reason for providing a plaintiff with notice of intent tolling is to compensate for the fact that he or she must file a notice of intent 182 days before filing a complaint. If, however, a plaintiff does not have to file a notice of intent and then wait 182 days before filing a complaint, why should the plaintiff be afforded 182 more days in which to file the complaint?

Justice YOUNG observes that the "majority's analysis threatens to render the statutory notice procedure nugatory and undermines, if not overrules, this Court's precedent," *ante* at 432, and that it "threatens to deprive a named defendant of the notice that the statutory procedure is designed to provide," *ante* at 450. Although I agree with these observations, I believe that the same possibly can be said of Justice YOUNG's own analysis.[18] He concludes that a notice of intent that is sufficient as to one defendant tolls the statute of limitations for all the defendants, regardless of how defec-

[17] For the same reason that a notice of intent that does not comply with § 2912b does not toll the statute of limitations, a notice of intent that is not required by § 2912b does not toll the statute of limitations. That is, if a plaintiff serves a defendant with a notice of intent that is not required by § 2912b, notice is not "given in compliance with section 2912b," the plaintiff does not have to wait 182 days to file his or her complaint, i.e., there is no "applicable notice period under section 2912b," and thus notice of intent tolling under § 5856(d) is not applicable.

[18] The saving grace of Justice YOUNG's analysis with regard to tolling is that it apparently would only apply to the former version of § 5856 that is at issue, not to the amended version that is applicable to all actions filed after April 22, 2004. See *ante* at 444.

tive the notice of intent is as to these other defendants or whether these other defendants were even entitled to a notice of intent in the first place. That is, although § 2912b(4) and *Roberts II* clearly require the plaintiff to provide all defendants with a notice of intent that is sufficient as to each, and although § 5856(d) and *Roberts I* clearly limit tolling to notices that are "given in compliance with section 2912b," Justice YOUNG concludes that a notice of intent that is clearly not "in compliance with section 2912b" as to multiple defendants nevertheless tolls the statute of limitations as to these defendants as long as at least one defendant is given a notice of intent that is "in compliance with section 2912b." How are *other* defendants to receive the "notice that the statutory procedure is designed to provide"?[19]

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[19] Justice YOUNG contends that "a plaintiff's failure to provide a defendant with a sufficient [notice of intent] still entitles that defendant to dismissal, tolling notwithstanding." *Ante* at 443 n 25. However, this interpretation would seem to create a trap for unwary plaintiffs because MCL 600.2912b(6) prohibits the "tacking or addition of successive 182-day periods . . . ." As this Court explained in *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 3; 704 NW2d 69 (2005), "Section 2912b(6) prohibits a plaintiff from giving presuit notice to a defendant multiple times in order to initiate multiple tolling periods that repeatedly extend the period of limitations." Accordingly, if a notice that was filed within 182 days before the period of limitations would have expired and that is sufficient as to the defendant physician but defective as to the defendant hospital tolls the statute of limitations as to both, and § 2912b requires dismissal as to the hospital (as a result of the defective notice), the plaintiff's next notice sent to the hospital would not toll the statute of limitations (as a result of § 2912b[6]), and thus the plaintiff's action against the hospital would then be barred by the statute of limitations (since there would be no way for the plaintiff to file a sufficient notice and then wait 182 days to file suit against the hospital without the benefit of *another* 182-day tolling period). That is, what Justice YOUNG gives with one hand (defective notice tolls), he takes away with the other hand (defective notice requires dismissal and plaintiff cannot refile). Assuming that Justice YOUNG's response to this conundrum is that the original complaint tolls the statute of limitations applicable to the hospital, under

D. RETROACTIVE AMENDMENTS

Although the majority does not address this issue because it concludes that the notice of intent is sufficient, in *Bush v Shabahang*, 484 Mich 156, 181 n 44; 772 NW2d 272 (2009), the majority concludes that, pursuant to MCL 600.2301, a plaintiff can simply amend a defective notice of intent and such amendment will "relate back to the time that the original [notice of intent] was mailed" or the courts alternatively can simply "disregard any error or defect" in the notice of intent. I respectfully disagree. See *Bush*, 484 Mich at 194-195 (MARKMAN, J., dissenting). MCL 600.2301 provides:

> The court in which any action or proceeding is *pending*, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties. [Emphasis added.]

As this Court explained in *Boodt*, 481 Mich at 563 n 4, "§ 2301 only applies to pending actions." As discussed above, § 2912b(1) provides, "a person *shall not commence an action* alleging medical malpractice against a health professional or health facility unless the person

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§ 5856(a) (although the complaint has been dismissed against the hospital), he would then create a situation in which a plaintiff would have absolutely no incentive to file a notice that complies with § 2912b as to the hospital or any other defendant as long as he files a notice that complies with § 2912b as to one defendant, because the statute of limitations would presumably be tolled indefinitely by the complaint that has not been dismissed. The plaintiff would then apparently have an unlimited period of time in which to file a sufficient notice and to refile the complaint against the remaining defendants (or at least until all the claims were dismissed or otherwise adjudicated).

has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." (Emphasis added.) Section 2912b(4) states that the "notice given to a health professional or health facility under this section *shall contain* a statement of at least *all* of the following . . . ." (Emphasis added.) Therefore, as we explained in *Boodt*, 481 Mich at 562-563, "a plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4)."[20] Because plaintiff's notice of intent here did not contain all the information required under § 2912b(4) as to HVR, plaintiff could not have commenced a medical malpractice action against HVR.[21] Therefore, § 2301 is inapplicable, and plaintiff cannot retroactively amend the notice of intent and the courts cannot "disregard any error or defect" in the notice of intent.

E. MAJORITY PROCEDURES

As noted in n 1 of this opinion, the majority addresses issues that are not even properly before it. In Docket No. 136336, plaintiff appealed the portion of the Court of Appeals decision that held that the notice of intent was defective as to HVR, and in Docket Nos. 136338 and

[20] For further discussion of *Boodt*, see my dissenting opinion in *Bush*, 484 Mich at 195, 199-200.

[21] In *Bush*, 484 Mich 170 n 26, the majority mischaracterized *Boodt* as holding that "because no tolling was afforded in the presence of a defect pursuant to § 5856(d), the plaintiff's action was not commenced under § 2912b(1)." However, it was not the lack of tolling that prevented the plaintiff's action from commencing, it was the lack of a notice of intent in compliance with § 2912b. See § 2912b(1) and (4) ("[A] person shall not commence an action alleging medical malpractice . . . unless the person has given . . . written notice . . . [that] contain[s] a statement of at least all of the following . . . .").

136339, defendants appealed the portion of the decision that held that the defective notice of intent tolled the statute of limitations, and thus that a dismissal without prejudice was appropriate, and the portion that held that the notice of intent was sufficient as to defendant Murry. In Docket No. 136336, we granted plaintiff's application "*limited* to the issue whether defendant Huron Valley Radiology, P.C., is a 'health facility or agency' to which a plaintiff is required to provide notice under MCL 600.2912b(1)." 482 Mich 1004 (2008) (emphasis added). In Docket Nos. 136338 and 136339, we held defendants' application in abeyance for plaintiff's application. 756 NW2d 85 (2008). Subsequently, in Docket No. 136336, we directed the parties to file briefs addressing "whether, if a defendant professional corporation is not an entity to whom notice is required to be provided under MCL 600.2912b, the applicable statute of limitations, MCL 600.5805(6), was nonetheless subject to statutory tolling provided in former MCL 600.5856(d)." 483 Mich 922 (2009). However, we never asked the parties to address the sufficiency of the notice of intent as to either HVR or Murry. As a result, the parties did not, in fact, brief or argue these issues. See n 1 of this opinion.

Thus, despite the fact that the parties have not had an opportunity to brief or argue these issues, and, indeed, despite the fact that the issue regarding the sufficiency of the notice of intent as to defendant Murry has been formally *abeyed*, the majority nonetheless addresses these issues and implicitly overrules *Roberts II* in the process.[22] The majority implicitly overrules

[22] "The Court shall not issue any peremptory order unless it is signed by five Justices, except where a majority of Justices conclude that emergency circumstances warrant the issuance of such an order." Minutes of the Conference on Administrative Matters, Item 2, 2003-31, Internal Rules, July 24, 2003. The majority violates this rule by reversing

Roberts II by refusing to follow its holdings: (a) that a notice of intent must indicate whether the plaintiff is seeking to hold the defendant professional corporation vicariously or directly liable, and instead holding that as long as the plaintiff is only going to sue the defendant on the basis of vicarious liability it does not have to indicate this in the notice of intent; and (b) that a notice of intent must contain all the statements required by § 2912b(4), and instead holding that a notice of intent is sufficient as long as the defendant "could reasonably be held to comprehend the nature of the claims being asserted against it." *Ante* at 425. The majority does this without so much as a mention of stare decisis. What happened to the view that "[t]he Michigan Supreme Court should not alter the precedent . . . without first hearing oral argument and inviting briefing on it"? *Scott v State Farm Mut Auto Ins Co*, 482 Mich 1074, 1076-1077 (2008) (KELLY, J., dissenting). What happened to the view that by "fail[ing] to comprehend how the skilled advocates in this case could have added anything insightful in the debate over the proper interpretation of . . . precedent . . . the majority undermines the foundations of our adversarial system"? *Mack v Detroit*, 467 Mich 186, 223; 649 NW2d 47 (2002) (CAVANAGH, J., dissenting). Apparently, these views are only pertinent where precedents with which the majority agrees are at stake.[23]

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the Court of Appeals on the issue of the sufficiency of the notice of intent as to defendant HVR without briefing or oral argument, and without the requisite five votes, because, although this issue was raised in plaintiff's application for leave to appeal, we granted leave to appeal only as to a different issue.

[23] For further discussion on the subject of the majority and stare decisis see *Petersen v Magna Corp*, 484 Mich 300, 388-396; 773 NW2d 564 (2009) (MARKMAN, J., dissenting), and *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 223-247; 731 NW2d 41 (2007) (MARKMAN, J., concurring).

To summarize my concerns with the majority opin-

Increasingly, the same regard for precedent evidenced in this case towards *Roberts II* by the majority, see 462-463 of this opinion, has been reflected toward other disfavored and inconvenient precedents: they are simply ignored. For illustrations of this phenomenon, see e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), in which the new majority ignored *Vega v Lakeland Hosps*, 479 Mich 243, 244; 736 NW2d 561 (2007); *Hardacre v Saginaw Vascular Services, PC*, 483 Mich 918 (2009), in which it failed to follow *Boodt*, 481 Mich 558; *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), in which it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606; 295 NW 331 (1940), and *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471; 592 NW2d 46 (1999); *Juarez v Holbrook*, 483 Mich 970 (2009), in which it failed to follow *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008); *Beasley v Michigan*, 483 Mich 1025 (2009), in which the majority failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007); *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009), in which the majority failed to enforce *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997); and *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), in which the majority again failed to abide by *Rowland*.

Chief Justice KELLY contends that "the accusation that the Court has been ignoring precedent is incorrect." *Ante* at 429. As Justice CORRIGAN explained in *Beasley*, 483 Mich at 1029-1030 (CORRIGAN, J., dissenting), in response to this same contention:

> Chief Justice KELLY attempts to explain away the new majority's actions by sharing her views regarding the prior caselaw that the new majority has otherwise chosen to ignore. But Chief Justice KELLY's interpretation of a prior case in a concurring statement is not a decision of the Court. More importantly, her argument overlooks the fundamental problem: the new majority's continuing failure to explain its apparent disregard of this Court's precedent undermines the predictability and stability of the rule of law.
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> * * *
>
> [T]he new majority offers no articulable reasons whatsoever for its apparent detours from stare decisis. Instead, the majority declines to explain whether—and, if so, why—it is overruling precedent despite the obvious appearance that it is doing so. If it intends to alter legal principles embedded in this Court's decisions, then the new majority should explain its reasons clearly and

ion: (1) it addresses issues that have neither been brief nor argued; (2) it addresses an issue that was formally abeyed; (3) it violates one of this Court's internal rules by reversing the Court of Appeals on an issue that has neither been briefed nor argued, without the required five votes and in the absence of any emergency circumstances; (4) it concludes that HVR was entitled to a notice of intent simply because this is a medical malpractice action and because the words "professional corporation" can be found in § 5838a, without any discussion of whether HVR is either a "health professional or health facility" under § 2912b(1); (5) it concludes that the requirement of § 2912b(4)(a) that the notice of intent contain a statement of the "factual basis for the claim" does not require a statement indicating that the reason that the defendant professional corporation is being sued is because the defendant physician

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> intelligibly. Instead, the new majority overrules by indirection, or at least leaves the impression that it is doing so, thereby sowing the seeds of confusion and making it difficult for the citizens of this state to comprehend precisely what our caselaw requires. This appears to be an unfortunate return to our predecessors' past practice of "frequently pa[ying] little attention to the inconsistencies among its cases and declin[ing] to reduce confusion in [the Court's] jurisprudence by overruling conflicting decisions." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 571 n 19 (2005).

See also *Rowland*, 477 Mich at 226-227 (MARKMAN, J., concurring), for further discussion of the penchant of some justices to ignore inconvenient precedents, thereby "[leaving] intact precedents that were inconsistent with new decisions, essentially allowing future litigants to choose among inconsistent precedents as in columns A and B of a Chinese restaurant menu."

> In the end, there is no shortcut to resolving whether the majority or the dissenting justices are correct in their characterizations of what the majority is doing. We can only identify what we believe to be the questionable decisions of the majority, identify the relevant precedents, and invite the reader to reach his or her own conclusions. [*Petersen*, 484 Mich at 392 n 47 (MARKMAN, J. dissenting).]

was working at the corporation at the time of the alleged malpractice; (6) it concludes that the requirement of § 2912b(4)(b) that the notice of intent contain a statement of the "applicable standard of practice or care" does not require a statement indicating whether the plaintiff is seeking to hold the defendant professional corporation directly or vicariously liable; (7) it relies upon a distinction without any difference to conclude that *Roberts II* is not dispositive; (8) it questions whether *Roberts II* was correctly decided with regard to whether a notice of intent must be particularized, leaving the bench and bar at a loss as to whether *Roberts II* remains good law on this issue; and (9) it implicitly overrules *Roberts II*'s holding that a notice of intent must indicate whether the plaintiff is seeking to hold the defendant professional corporation vicariously or directly liable and its holding that a notice of intent must contain all of the statements required by § 2912b(4), without any mention whatsoever of stare decisis.

IV. CONCLUSION

Although the notice of intent was sufficient as to defendant Murry, it was insufficient as to defendant HVR. As this Court held in *Roberts I*, a defective notice of intent does not toll the statute of limitations. Because the complaint was filed more than two years after the alleged malpractice occurred, the action against HVR is time-barred. Accordingly, I would affirm the portions of the Court of Appeals opinion that held that the notice of intent was sufficient as to defendant Murry and insufficient as to defendant HVR, but reverse the portions that held that the defective notice of intent tolled the statute of limitations and thus that a dismissal without preju-

dice was appropriate. The action against HVR should be dismissed with prejudice.

HENRY v DOW CHEMICAL COMPANY

Docket No. 136298. Argued March 3, 2009 (Calendar No. 9). Decided July 31, 2009.

Gary and Kathy Henry and others brought an action in the Saginaw Circuit Court against Dow Chemical Company, alleging that the defendant negligently released dioxin, a toxic chemical, into the Tittabawassee River flood plain, where the plaintiffs live and work. The plaintiffs moved for certification of two classes: one consisting of approximately 2,000 individuals who owned property within the 100-year flood plain of the Tittabawassee River and the other consisting of individuals who sought ongoing medical monitoring at the defendant's expense. The court, Leopold P. Borrello, J., denied the defendant's motion for summary disposition of the medical-monitoring claim, and the Court of Appeals, GRIFFIN, P.J., and WHITBECK, C.J. (OWENS, J., dissenting), denied leave to appeal that ruling in an unpublished order entered October 29, 2003 (Docket No. 251234). The Supreme Court, after granting leave to appeal and staying the proceedings below, held that the plaintiffs had not established the requisite element of actual harm, and accordingly remanded the case to the trial court for the entry of an order of summary disposition in the defendant's favor regarding the medical-monitoring claim. 473 Mich 63 (2005). On remand, the trial court certified the proposed class of real-property owners under MCR 3.501(A)(1) with respect to the remaining claims of negligence and nuisance. This ruling was appealed to the Court of Appeals, FORT HOOD, J. (METER, J., concurring in part and dissenting in part, and K. F. KELLY, P.J., dissenting), which affirmed the trial court's certification order with respect to determining the defendant's liability, but not with respect to determining damages. Unpublished opinion of the Court of Appeals, issued January 24, 2008 (Docket No. 266433). The Supreme Court granted the defendant's application for leave to appeal. 482 Mich 1043 (2008).

In an opinion by Justice WEAVER, joined by Chief Justice KELLY and Justices CAVANAGH and HATHAWAY, the Supreme Court *held*:

A party seeking class certification bears the burden of establishing that each of the prerequisites for class certification in MCR 3.501(A)(1) is in fact satisfied. It is not sufficient for a certifying

court to simply accept a party's assertion that the prerequisites are met. When looking beyond a party's assertions in order to assess whether the prerequisites for class certification are met, a certifying court should do so without delving into the merits of the underlying claims. Because the circuit court may have used an evaluative framework that is inconsistent with this Court's interpretation of the rule and articulation of the proper analysis for class certification, this case is remanded to the circuit court so that it may clarify, in light of this Court's decision, its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met.

1. The standard of review for class certification encompasses de novo review on questions of law, review for clear error on questions of fact, and review for abuse of discretion on the ultimate decision on the motion for class certification. The Michigan Court Rules govern the procedure for certifying class actions in Michigan courts. MCR 3.501(A)(1) provides specific prerequisites for proposed plaintiff classes, and a party seeking class certification bears the burden of proving that all these prerequisites are met. This burden cannot be sustained on the basis of a party's bare assertion that the prerequisites have been met. The trial court must determine that all the prerequisites are satisfied before it may certify a class. The averments in the pleadings of a party seeking class certification are only sufficient to certify a class if they satisfy the burden on the party seeking certification to prove that the prerequisites are met, such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party. If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper. In so doing, the court must analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case.

2. The rule articulated in *Neal v James*, 252 Mich App 12 (2002), requiring a trial court to accept as true the allegations supporting a motion for class certification, is overruled to the extent that it could be read to require a trial court to accept as true a plaintiff's bare assertion that a class certification prerequisite is met.

3. The trial court's indication in this case that it was required to accept the allegations of the plaintiff in support of the motion for class certification as true is at least potentially inconsistent with the court rules, which allow class certification only if the prerequisites listed in MCR 3.501(A)(1) are met. The class certification in this case must be vacated to the extent the trial court used this incorrect standard. This case is therefore remanded to

the trial court so that it can clarify its analysis of MCR 3.501(A)(1)(c) and (d). If, on remand, the trial court determines that the standard it used is inconsistent with the proper standard, it should reanalyze all the class certification prerequisites under MCR 3.501(A)(1). If the trial court determines that it used the correct legal standard in ruling on the plaintiffs' motion for class certification, it need only revisit MCR 3.501(A)(1)(c) and (d) in order to provide further explanation on the record for its conclusion that the prerequisites were met.

Justice KELLY, concurring, wrote separately to address Justice MARKMAN's comments regarding the majority's lack of respect for the doctrine of stare decisis and to explain why the accusation that the Court has been ignoring precedent is incorrect.

Affirmed in part, class certification order vacated, and case remanded for further proceedings.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, concurring in part and dissenting in part, concurred in part II of the majority opinion regarding the appropriate appellate standard of review for class certification decisions and part III(A) of the majority opinion regarding the appropriate legal standard a trial court must apply in ruling on a motion for class certification. He also concurred in the majority's decision to overrule *Neal* to the extent it required a trial court to accept as true a plaintiff's bare assertion that a class certification prerequisite is met. Because the trial court used the wrong legal standard in certifying the class, he would vacate the trial court's class certification decision in its entirety and, on remand, limit any certification of the proposed class to issues of liability because the plaintiffs did not cross-appeal the Court of Appeals judgment that vacated class certification with respect to the issue of damages.

Justice CORRIGAN, joined by Justice MARKMAN, concurred fully with Justice YOUNG, and wrote separately to state that the class proposed by plaintiffs is too broad because it includes members who have not suffered present injuries.

Justice WEAVER, in a separate opinion, explained her participation in the case in light of her recent inheritance of 108 shares of the defendant's stock, reproduced the disclosure statement sent to the parties on her behalf, and renewed her call for fair, clear, written rules for disqualification of Supreme Court justices.

Justice YOUNG, in a separate opinion, responded to Justice WEAVER'S separate opinion regarding her participation, clarifying that he did not disagree with her decision to notify the parties of her ownership interest in the defendant but challenged the ad-

equacy of the disclosure. He stated his belief that any ownership interest in a party precludes a judge's participation under MCR 2.003(B)(5), as it would under the analogous federal statute. His opinion included his statement to the parties in response to the disclosure statement sent on Justice WEAVER's behalf.

1. ACTIONS — CLASS ACTIONS — MOTIONS TO CERTIFY CLASS ACTIONS — STANDARDS OF REVIEW.

The standard of review for class certification encompasses de novo review on questions of law, review for clear error on questions of fact, and review for abuse of discretion on the ultimate decision on the motion for class certification.

2. ACTIONS — CLASS ACTIONS — MOTIONS TO CERTIFY CLASS ACTIONS — PREREQUISITES FOR CLASS CERTIFICATION — BURDEN OF PROOF.

A party seeking class certification cannot sustain its burden of proving that all the prerequisites of the Michigan Court Rules are met by means of a bare assertion that the prerequisites have been met unless the facts necessary to support such a finding are uncontested or admitted by the opposing party (MCR 3.501[A]).

3. ACTIONS — CLASS ACTIONS — MOTIONS TO CERTIFY CLASS ACTIONS — PREREQUISITES FOR CLASS CERTIFICATION.

If the pleadings alone are not sufficient to establish that the prerequisites for class certification have been met, a trial court must look beyond the pleadings to determine whether class certification is proper by analyzing any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case (MCR 3.501[A]).

Trogan & Trogan, P.C. (by *Bruce F. Trogan*), *The Woody Law Firm P.C.* (by *Teresa A. Woody*), *Stueve Siegel Hanson LLP* (by *Norman E. Siegel* and *Todd M. McGuire*), and *Spencer Fane Britt & Browne LLP* (by *Carl H. Helmstetter* and *Michael F. Saunders*) for the plaintiffs.

Dickinson Wright PLLC (by *Kathleen A. Lang* and *Phillip J. DeRosier*), *Braun Kendrick Finkbeiner, PLC* (by *John A. Decker*), and *Kirkland & Ellis LLP* (by *Douglas Kurtenbach* and *Christopher Landau*) for the defendant.

Amici Curiae:

Macuga, Liddle & Dubin, P.C. (by *David R. Dubin*), for the *Brindley* plaintiff class.

Plunkett Cooney (by *Mary Massaron Ross* and *Hilary A. Dullinger*) for DRI and Michigan Defense Trial Counsel.

Honigman Miller Schwartz and Cohn LLP (by *Norman C. Ankers and Bruce L. Segal*) for the Michigan Chamber of Commerce.

Thomas A. Biscup for the Michigan Association for Justice.

Clark Hill PLC (by *David D. Grande-Cassell* and *Kristin B. Bellar*) for the Michigan Manufacturers Association.

Dykema Gossett PLLC (by *James P. Feeney*, *Jill M. Wheaton*, and *Thomas M. Hanson*) for Product Liability Advisory Council, Inc.

Charfoos & Christensen, P.C. (by *David R. Parker*) for the Science and Environmental Health Network, the Ecology Center, the Lone Tree Council, the Michigan League of Conservation Voters, the Michigan Environmental Council, and the Great Lakes Environmental Law Center.

Shook, Hardy & Bacon L.L.P. (by *Dana M. Mehrer*, *Victor E. Schwartz*, and *Cary Silverman*) (*Robin S. Conrad*, *Amar D. Sarwal*, *Quentin Riegel*, and *Donald D. Evans*, of counsel) for the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the American Chemistry Council.

WEAVER, J. Class action litigation in Michigan is governed by the Michigan Court Rules, and MCR 3.501(A)(1) specifically sets forth the prerequisites for class certification. These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority.[1]

In this case we consider the proper analysis a court must conduct when determining whether the prerequisites for class certification have been met. Additionally, we consider whether this particular class of plaintiffs was erroneously certified by the circuit court.

In deciding these questions, we conclude that a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied. A court should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings.

Additionally, we remand this case to the circuit court for clarification of its analysis of MCR 3.501(A)(1)(c) and (d) in light of our opinion today.

I. FACTS AND PROCEDURAL BACKROUND

This case arises from allegations that defendant, Dow Chemical Company, negligently released dioxin, a synthetic chemical that is potentially hazardous to human health, from its Midland plant into the Tittabawassee River. The representative plaintiffs allege that they, along with the proposed class members, have incurred property damage caused by the dioxin contamination. Plaintiffs' claims are based on theories of

[1] See *infra* at 496-497 for the complete court rule containing the prerequisites for class certification.

negligence and nuisance. This dispute concerns the circuit court's decision to grant plaintiffs' motion for class certification.

At the outset, we note that Dow's alleged dioxin contamination of the Tittabawassee River has been the subject of a prior appeal in this Court (*Henry I*).[2] In *Henry I*, we addressed plaintiffs' allegations that dioxin negligently released by Dow caused a risk of harm to their health.[3] In *Henry I*, we articulated the basic facts and procedural history surrounding the alleged dioxin contamination as follows:

> Defendant, The Dow Chemical Company, has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan, for over a century. The plant has produced a host of products, including, to name only a few, "styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chloropyrifos, Dursban and 2, 4, 5-trichlorophenol." Michigan Department of Community Health, Division of Environmental and Occupational Epidemiology, *Pilot Exposure Investigation: Dioxin Exposure in Adults Living in the Tittabawassee River Flood Plain, Saginaw County, Michigan*, May 25, 2004, p 4.
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> According to plaintiffs and published reports from the [Michigan Department of Environmental Quality (MDEQ)], defendant's operations in Midland have had a deleterious effect on the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical believed to cause a variety of health problems such as cancer, liver disease, and birth defects.
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> By spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain. Further investigation by the MDEQ indicated that defendant's Midland plant was the likely source of the dioxin.

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[2] *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005) (*Henry I*).

[3] *Id*. at 67.

Michigan Department of Environmental Quality, Remediation and Redevelopment Division, *Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, p 42 (identifying Dow's Midland plant as the "principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils").

In March 2003, plaintiffs moved for certification of two classes in the Saginaw Circuit Court. The first class was composed of individuals who owned property in the flood plain of the Tittabawassee River and who alleged that their properties had declined in value because of the dioxin contamination. The second group consisted of individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from Dow's Midland plant. This latter class consists of 173 plaintiffs and, by defendant's estimation, "thousands" of putative members.

Defendant moved under MCR 2.116(C)(8) for summary disposition of plaintiffs' medical monitoring claim. The Saginaw Circuit Court denied this motion, and denied defendant's subsequent motions for reconsideration and for a stay of proceedings.

After the Court of Appeals denied defendant's motion for peremptory reversal and emergency application for leave to appeal, the defendant sought emergency leave to appeal in this Court. Discovery and other preliminary proceedings on plaintiffs' motion for class certification continued in the Saginaw Circuit Court until, on June 3, 2004, we stayed the proceedings below and granted defendant's application for leave to appeal.[4]

Given that plaintiffs did not allege a *present* medical injury, we concluded that plaintiffs did not assert a viable negligence claim recognized by Michigan com-

[4] *Id*. at 69-70.

mon law.[5] Therefore, we reversed the circuit court's denial of Dow's motion for summary disposition with regard to plaintiffs' medical monitoring claims and remanded the matter to the circuit court for entry of an order of summary disposition accordingly.[6]

On remand, the circuit court addressed plaintiffs' motion for class certification with respect to the remaining claims of negligence and nuisance, which are the subjects of the present appeal. The current proposed class consists of persons owning real property within the 100-year flood plain of the Tittabawassee River on February 1, 2002.[7] The proposed class is estimated by plaintiffs to consist of approximately 2,000 persons.

The circuit court certified the proposed class, concluding that the prerequisites for class certification in MCR 3.501(A)(1) were met. Specifically, the circuit court ruled that joinder of approximately 2,000 persons is impracticable, the question of Dow's allegedly negli-

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[5] *Id*. at 81.

[6] *Id*. at 102.

[7] Plaintiffs define the scope of the 100-year flood plain of the Tittabawassee River as the geographic area bounded on the west and south by River Road and Stroebel Road, including areas on the west and south side of those roads, and bounded on the east and north by Midland Road, St. Andrews Road, and Michigan Avenue, including areas on the east and north side of those roads.

The Michigan Department of Environmental Quality provides the following information regarding "floodplains" on its website:

> A river, stream, lake, or drain may on occasion overflow [its] banks and inundate adjacent land areas. The land that is inundated by water is defined as a floodplain. In Michigan, and nationally, the term floodplain has come to mean the land area that will be inundated by the overflow of water resulting from a 100-year flood (a flood which has a 1% chance of occurring any given year). [<http:www.michigan.gov/deq/0,1607,7-135-3313_3684_3725—-,00.html> (accessed July 14, 2009).]

gent pollution is common to all plaintiffs, the mere fact that damages may be individualized is not sufficient to defeat class certification, the plaintiffs' property claims arise from the same alleged actions of Dow, the class members share common legal and remedial theories, and the representative plaintiffs are able to fairly and adequately protect the interests of the proposed class members.

Additionally, the circuit court determined that maintenance of this suit as a class action is the superior method of adjudication given that denial of class certification may result in up to 2,000 individual suits against Dow. The circuit court further reasoned that a class action would be manageable here because the class members all reside in the allegedly polluted area and similar evidence would be required to establish Dow's negligence with respect to each class member.

The Court of Appeals granted Dow's application for leave to appeal from the circuit court order granting class certification. In a divided decision, the Court of Appeals affirmed the class certification with regard to the issue of Dow's liability only.[8]

The lead opinion concluded that class certification on *all* issues, including the issue of damages, is proper.[9]

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[8] *Henry v Dow Chem Co*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 266433).

[9] The lead opinion reviewed the order for clear error and concluded that because neither party requested an evidentiary hearing in the circuit court, there were no factual findings to review. *Henry*, unpub op at 7-8 (opinion of FORT HOOD, J.). Additionally, the lead opinion concluded that the circuit court properly relied on caselaw in support of its decision to grant certification. *Id.* at 8. The lead opinion referred to two published Court of Appeals opinions in which class certification was deemed inappropriate: *Zine v Chrysler Corp*, 236 Mich App 261; 600 NW2d 384 (1999), and *Tinman v Blue Cross & Blue Shield*, 264 Mich App 546; 692 NW2d 58 (2004). After reviewing those cases, the lead opinion concluded that both cases required more of an individual-

The lead opinion relied on the MDEQ findings submitted by plaintiffs and held that, in light of the MDEQ's findings and the fact that the parties presented contradicting theories of the dioxin contamination, the circuit court did not clearly err.[10]

A partial concurrence to and partial dissent from the lead Court of Appeals opinion agreed that the circuit court did not err in certifying the class with respect to Dow's liability, but concluded that individualized questions prevailed with respect to the issue of damages. Thus, the partial concurrence and partial dissent reasoned that a bifurcated proceeding would be the most appropriate manner of adjudication.[11]

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ized inquiry than in the present case and, therefore, the present case is factually distinguishable. *Henry*, unpub op at 8-11 (opinion of FORT HOOD, J.).

[10] The MDEQ's findings are set forth in a "declaration" made by the MDEQ. The declaration indicates that some of the levels of dioxin initially discovered near the Tittabawassee River were as high as 2,200 parts per trillion, which is a concentration 25 times that of the residential direct contact criterion. The declaration further explains that the dioxin was likely transported downstream onto the flood plain during flood events.

The declaration indicates that the MDEQ hired a survey firm to develop a flood plain map and establish the 100-year flood plain at issue. On the basis of the survey results, the MDEQ issued an information bulletin to 2,500 individuals explaining the potential hazards of dioxin exposure and the MDEQ's need for further investigation.

According to the declaration, further investigations confirmed the presence of excessive dioxin concentrations. This discovery permitted the MDEQ to classify each contaminated property as a "facility." The effect of the "facility" designation includes the imposition of various obligations on the affected property owners. Pursuant to state environmental laws, these property owners must notify potential purchasers of the dioxin contamination.

The MDEQ's declaration identifies Dow's Midland facility as the "principal source" of the dioxin. The declaration clarifies that dioxin concentrations from other sources were too low to result in the levels of dioxin discovered.

[11] In a "bifurcated" proceeding, the class would be certified with respect to the issue of Dow's liability. If Dow's liability is established,

The Court of Appeals dissent concluded that the circuit court did not engage in a "rigorous analysis" to determine whether the prerequisites for class certification are met, as required by *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982). Therefore, the dissent concluded that the class was erroneously certified with respect to *all* issues.[12]

This Court granted Dow's application for leave to appeal, asking the parties to address, among other issues, whether the federal "rigorous analysis" requirement for class certification also applies to state class actions and whether this particular class of plaintiffs was properly certified by the circuit court.[13]

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individual plaintiffs must then choose whether to seek damages on their own. *Henry*, unpub op at 2 (METER, P.J., concurring in part and dissenting in part). As the partial concurrence and partial dissent reasoned, the circuit court may "use case-management tools to consolidate claims that will involve largely similar proofs on the issue of damages." *Id*.

[12] *Henry*, unpub op at 1 (K. F. KELLY, J., dissenting). The dissent additionally opined that individual issues overwhelmingly predominate over any common issues of fact and law in this case, specifically noting that the flooding pattern is not uniform for each plaintiff involved. *Id*. at 5.

[13] *Henry v Dow Chem Co*, 482 Mich 1043 (2008). The order asked the parties to consider specifically:

> (1) whether the "rigorous analysis" requirement for class certification that is applied in the federal courts also applies to state class actions, see *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982); (2) if so, whether the Saginaw Circuit Court engaged in the required rigorous analysis to determine if class certification was appropriate; (3) whether the plaintiffs met all of the requisites for class certification established in MCR 3.501(A)(1), including the requirement that questions of law or fact common to the members of the class predominate over questions affecting only individual members; and (4) whether the plaintiffs established that they suffered injury on a class wide basis in order to justify class certification.

II. STANDARD OF REVIEW

In order to resolve the issues presented in this case, this Court must first consider the proper application of MCR 3.501(A). The proper interpretation and application of a court rule is a question of law, which we review de novo.[14] This court uses the principles of statutory construction when interpreting a Michigan court rule.[15] We begin by considering the plain language of the court rule in order to ascertain its meaning.[16] "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole."[17]

However, we note that this Court has not formally established the standard of review for class certification decisions. Therefore, we take this opportunity to do so. We have held that where a party challenges a trial court's factual findings, a review for clear error is appropriate, and where a party challenges a trial court's exercise of discretion, a review for abuse of discretion is appropriate.[18] Given that the analysis a trial court must

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[14] *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

[15] *Id*.

[16] *Id*. at 705.

[17] *Id*. at 706.

[18] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). In *Herald*, this Court clarified, in the context of the Freedom of Information Act (FOIA), that if a party challenges some underlying fact supporting the trial court's decision, then the appropriate standard of review is clear error, and the reviewing court must defer to the trial court's view of the facts unless the reviewing court is "left with the definite and firm conviction that a mistake has been made by the trial court." *Id*. at 472. However, we further held that "when an appellate court reviews a decision committed to the trial court's discretion, such as the balancing test at issue in [FOIA cases], . . . the appellate court must review the discretionary determinations for an abuse of discretion . . . ." *Id*.

undertake in order to determine whether to certify a proposed class may involve making both findings of fact *and* discretionary determinations, we find it proper to review the trial court's factual findings for clear error and the decisions within the trial court's discretion for abuse of discretion. This differentiated standard of review for class certification decisions is consistent with the mixed nature of a proper class certification analysis.

III. ANALYSIS

The parties dispute whether the federal "rigorous analysis" requirement for class certification also applies to state class actions and whether class certification was appropriate in this particular case.

A. WHAT IS THE PROPER ANALYSIS FOR DETERMINING WHETHER CLASS CERTIFICATION IS JUSTIFIED?

Pursuant to MCR 3.501(A)(1), members of a class may *only* sue or be sued as a representative party of all class members *if* the prerequisites dictated by the court rule are met. Therefore, in order to proceed with a suit in the form of a class action, the following circumstances must exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

Next, MCR 3.501(A)(2) sets forth the following nonexhaustive list of factors that a court should consider when determining whether maintaining a suit as a class action is the "superior" method of adjudication:

(a) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions. [MCR 3.501(A)(2).]

It is important to note that the rules governing class certification in MCR 3.501(A) very closely mirror the federal prerequisites for class certification found in FR Civ P 23. In *Falcon*, the United States Supreme Court reiterated that the class action device for litigation is " 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' "[19] The Supreme Court concluded that district courts must conduct a "rigorous analysis" of each of the class action prerequisites in FR Civ P 23 before certifying a class.[20]

Dow argues that the federal "rigorous analysis" requirement should apply to state class actions as well.[21] Dow asserts that representative plaintiffs will *always* allege that their proposed class complies with the prerequisites for class certification, and a trial court should not simply rely on these allegations when deciding whether to certify a class. While Dow concedes that a court may not deny class certification on the ground that plaintiffs are unlikely to prevail on the merits of their underlying claims, Dow argues that this prohibition alone does not relieve plaintiffs of their burden to establish that the prerequisites of class certification have in fact been met.

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[19] *Falcon*, *supra* at 155 (citation omitted).

[20] *Id.* at 161.

[21] Dow asserts that the "rigorous analysis" requirement has already been incorporated into Michigan caselaw in *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 258498), at 3, quoting *Falcon*, *supra* at 155.

In *Jackson*, the Court of Appeals reasoned that " 'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising plaintiff's cause of action,' " and the "rigorous analysis" may necessarily require the court to " 'probe behind the pleadings' and analyze the claims, defenses, relevant facts, and applicable substantive law 'before coming to rest on the certification question.' " *Jackson*, *supra* at 3, quoting *Falcon*, *supra* at 155, 160 (citation and quotation marks omitted).

Conversely, plaintiffs argue that only MCR 3.501(A) governs class certification in Michigan, and that this court rule does not mandate a "rigorous analysis." Additionally, plaintiffs point out that no decision by this Court, or any published opinion by the Court of Appeals, has held that the federal "rigorous analysis" requirement applies to state class actions.

Given that Michigan's requirements for class certification are nearly identical to the federal requirements, we find it reasonable to conclude that similar purposes, goals, and cautions are applicable to both.[22] While it is true that Michigan courts are not bound by any decision requiring a "rigorous analysis," we question whether the purpose of the strictly articulated class certification prerequisites would be defeated if a representative plaintiff's only burden is to simply state that its proposed class does in fact meet the prerequisites.

Dow argues that this type of lax burden would give courts the authority to "rubber stamp" a plaintiff's allegations that the prerequisites in MCR 3.501(A)(1) have been met. To avoid this danger, Dow urges this Court to clarify that the federal "rigorous analysis" standard applies for state class actions. However, Dow's argument seems to implicate only two options: either Michigan courts must conduct a "rigorous analysis" for class certification decisions, or Michigan courts may simply accept a plaintiff's bare assertions that the prerequisites for class certification are in fact met. We believe that Dow's argument is unnecessarily narrow in scope.

The plain language of MCR 3.501(A)(1) states that representative plaintiffs may pursue a class action suit

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[22] The United States Court of Appeals for the Sixth Circuit recognized class actions as a procedural device used "to achieve the economies of time, effort, and expense." *Sterling v Velsicol Chem Corp*, 855 F2d 1188, 1196 (CA 6, 1988).

"*only if*" the enumerated prerequisites are met. Thus, it is apparent that strict adherence to the class certification requirements is required. There is nothing ambiguous about this court rule. A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action. Furthermore, there is no authority in Michigan allowing a party seeking class certification to avoid this affirmative burden.

The next logical inquiry is what a party must show in order to satisfy a court that the prerequisites for class certification are established. More specifically, how must a court *analyze* a party's motion for class certification to determine whether sufficient information exists to justify certification?

Given that MCR 3.501(A)(1) contains carefully crafted prerequisites for class certification, common sense dictates that at least some greater analysis is required than simply accepting a party's bare assertion that the prerequisites have been met. The United States Supreme Court has labeled this greater analysis as a "rigorous" one in *Falcon*.[23] The problem is that *Falcon* provides little guidance as to what a "rigorous analysis" actually entails. Furthermore, *Falcon* is so factually distinct from the present case that we are unable to draw significant parallel conclusions.[24] What we *can* infer from the *Falcon* decision is that a court

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[23] *Falcon*, *supra* at 161.

[24] *Falcon* is based on federal claims of Title VII discrimination. The most significant issue in *Falcon* dealt with whether it was sufficiently shown that the representative plaintiff had claims that were typical of those of the other class members. The Supreme Court concluded that no showing had been made regarding questions of law or fact that were common to the claims of the representative employee and of the members of the class he sought to represent. The Supreme Court stated in conclusion that "a Title VII class action, like any other class action, may

must only certify a class in circumstances where the court has actually been *shown* that the prerequisites for class certification are satisfied.

Before *Falcon*, the United States Supreme Court held that trial courts should not conduct "a preliminary inquiry into the merits" of claims when making a class certification determination.[25] In *Falcon*, the Supreme Court reasoned that because the decision to certify a class involves considerations " 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,' " a court may at times need to look further than the pleadings to make a determination on class certification.[26] The Supreme Court added that, sometimes, the question of certification will be plainly and adequately answered by the pleadings.[27] After *Falcon*, the Supreme Court clarified that a trial court has broad discretion when determining whether a class should be certified; however, its discretion must be exercised within the framework of FR Civ P 23.[28]

Now, federal courts must balance both the prohibition against delving into the merits of claims during the class certification determination with the requirement that courts conduct a "rigorous analysis" to determine whether the class certification prerequisites are satisfied. The United States Court of Appeals for the Sixth Circuit recognizes that district courts must conduct a "rigorous analysis" to determine

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only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id*. at 161.

[25] *Eisen v Carlisle & Jacquelin*, 417 US 156, 177; 94 S Ct 2140; 40 L Ed 2d 732 (1974).

[26] *Falcon*, *supra* at 160, quoting *Coopers & Lybrand v Livesay*, 437 US 463, 469; 98 S Ct 2454; 57 L Ed 2d 351 (1978) (citation and quotation marks omitted).

[27] *Id*.

[28] *Gulf Oil Co v Bernard*, 452 US 89, 100; 101 S Ct 2193; 68 L Ed 2d 693 (1981).

whether the prerequisites in FR Civ P 23 are met.[29] In addition, the Sixth Circuit has acknowledged that it is possible to determine that the requirements for class certification are met solely on the basis of the pleadings.[30] Nevertheless, this determination often requires more information than the pleadings provide.[31]

We agree with Dow that a certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met.[32] However, the federal "rigorous analysis" requirement does not necessarily bind state courts.[33] We believe that the plain language of MCR 3.501(A) provides sufficient guidance for class certification decisions in Michigan. Given that MCR 3.501(A)(1) expressly conditions a class action on satisfaction of the prerequisites, a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied. A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met.[34] The averments in the pleadings of a party

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[29] *In re American Med Sys, Inc*, 75 F3d 1069, 1078 (CA 6, 1996).

[30] *Id*. at 1079, citing *Weathers v Peters Realty Corp*, 499 F2d 1197, 1200 (CA 6, 1974).

[31] *Id*.

[32] We note that plaintiffs do not contest this argument. In fact, plaintiffs assert that if this Court finds the need to articulate the proper analysis for class certification, it may find valuable guidance in Sixth Circuit decisions.

[33] See *Walters v Naddell*, 481 Mich 377, 390; 751 NW2d 431 (2008).

[34] The Sixth Circuit reasoned as follows in *In re American Med Sys*:

> "Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled.

seeking class certification are only sufficient to certify a class if they satisfy the burden on the party seeking certification to prove that the prerequisites are met, such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party.

If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper.[35] However, when considering the information provided to support class certification, courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings.[36] Similar to the federal district courts,

> Maintainability may be determined by the court on the basis of the pleadings, if sufficient facts are set forth, but ordinarily the determination should be predicated on more information than the pleadings will provide . . . . The parties should be afforded an opportunity to present evidence on the maintainability of the class action." [*In re American Med Sys*, *supra* at 1079, quoting *Weathers*, *supra* at 1200.]

[35] A court may permit discovery before ruling on class certification pursuant to MCR 3.501(B)(3)(b), which states: "The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures."

[36] *Beattie v CenturyTel, Inc*, 511 F3d 554, 560 (CA 6, 2007). In *Beattie*, the court acknowledged that a "rigorous analysis" must be applied to determine whether the prerequisites for class certification in FR Civ P 23 are met. However, the court also noted as follows:

> Rule 23 does not require a district court, in deciding whether to certify a class, to inquire into the merits of the plaintiff's suit. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177; 94 S. Ct. 2140; 40 L. Ed. 2d 732 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). *Daffin v. Ford Motor Co*., 458 F.3d 549, 553 (6th Cir. 2006); [*Id*.]

state courts also have broad discretion to determine whether a class will be certified.[37]

Certifying courts must be mindful that, when it is necessary to look beyond a party's assertions to determine whether class certification is proper, the courts shall analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case.[38] We believe the above analysis strikes the appropriate balance between the need to ensure that the class certification prerequisites are sufficiently satisfied and the need to preserve a trial court's discretion in making class certification decisions.

B. DID THE CIRCUIT COURT ENGAGE IN AN APPROPRIATE ANALYSIS TO DETERMINE IF THE PREREQUISITES FOR CLASS CERTIFICATION WERE SATISFIED IN THIS PARTICULAR CASE?

After reviewing the circuit court's decision, we believe its articulation and application of the analysis for class certification is potentially inconsistent with the required analysis. Therefore, we give the circuit court the opportunity to evaluate the class certification prerequisites in light of this Court's articulation of the proper analysis for determining whether class certification is justified.

Again, there are cases where the pleadings alone will be sufficient to establish that the prerequisites are met, and a court should not evaluate the merits of the case at

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[37] See *In re American Med Sys*, *supra* at 1079.

[38] In *Jackson*, the Court of Appeals did in fact rely on *Falcon*. However, the Court of Appeals did not lose sight of the prohibition against examining the merits of a case when determining whether to certify a class, even if the certifying court finds it necessary to " 'probe behind the pleadings' and analyze the claims, defenses, relevant facts, and applicable substantive law 'before coming to rest on the certification question.' " *Jackson*, *supra* at 3, quoting *Falcon*, *supra* at 160, and citing *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002).

the class certification stage; however, mere repetition of the language of MCR 3.501(A)(1) is not sufficient to justify class certification, and there must be an adequate statement of basic facts to indicate that each prerequisite is fulfilled. As we have concluded, at least some greater analysis is required than simply accepting a party's bare assertion that the prerequisites have been met. Thus, a circuit court may not simply accept as true a party's bare statement that a prerequisite is met unless the court independently determines that the plaintiff has at least alleged a statement of basic facts and law that are adequate to support that prerequisite.

In this particular case, before conducting its analysis of the class certification prerequisites, the circuit court announced that it must "accept the allegations of the plaintiff in support of the motion as true." This statement is potentially inconsistent with the standard adopted by this Court today to the extent that it could be read to require courts to accept as true plaintiffs' bare assertions that the class certification prerequisites are met.[39]

It is not clear whether the circuit court's understanding of the prerequisites of MCR 3.501(A)(1) was consistent with the proper analysis announced in this Court's decision today. We acknowledge that this case does not present a situation in which plaintiffs provided the circuit court with only a complaint containing bare assertions that the prerequisites of MCR 3.501(A)(1) were met and the circuit court granted plaintiffs' motion for class certification on the basis of those asser-

[39] The circuit court's statement of the appropriate standard is similar to the approach previously adopted by the Court of Appeals in *Neal*, *supra* at 15-16. Therefore, to the extent that *Neal* could be read to require a trial court to accept as true a plaintiff's bare assertion that a class certification prerequisite is met, we overrule *Neal*.

tions alone. Instead, the circuit court conducted a two-day hearing and reviewed numerous documents from both parties, including scientific studies, affidavits from experts, and information provided by the MDEQ. In its analysis of MCR 3.501(A)(1)(a), (b), and (e), the circuit court appears to have independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support each of those three prerequisites, and we hold that its analysis of those three prerequisites was sufficient. For MCR 3.501(A)(1)(c) and (d), however, the analysis conducted on the record by the circuit court was not sufficient to meet the proper analysis announced by this Court today.[40]

For MCR 3.501(A)(1)(c) and (d), where the analysis conducted by the circuit court on the record was not sufficient to meet the proper analysis, we do not believe that it is possible to look behind the circuit court's

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[40] For MCR 3.501(A)(1)(c), the typicality prerequisite, the circuit court's analysis consisted of a restatement of the standard; a statement that "plaintiffs contend" that their claims "arise from the same course of conduct" and that "they share common legal and remedial theories"; and a quote from a federal district court case stating that the typicality requirement may be satisfied if "there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class." It is unclear from the circuit court's analysis whether it independently determined that the plaintiffs alleged basic questions of law and fact sufficient to support their allegation that their legal remedial theories were typical of those of the class.

In the circuit court's analysis of MCR 3.501(A)(1)(d), the adequacy of representation prerequisite, it stated that "[t]he representative parties will fairly and adequately assert and protect the interest of the class." It supported this conclusion by reasoning that "no proof has been submitted to this Court that would indicate that the Plaintiffs herein, the representative parties, would not fairly and adequately assert and protect the interest of the class." In other words, the circuit court did not perform an analysis that sufficiently shows that it independently determined that the plaintiffs would adequately represent the class and also potentially shifted the burden to defendant to show that plaintiffs would *not* adequately represent the class.

analysis in order to guess whether the circuit court actually conducted the correct analysis or whether the circuit court would have reached the same result if it *had* conducted the correct analysis. Especially given the extensive evidentiary record developed in this case before the class certification decision, the circuit court may have made a valid, independent determination that the plaintiffs had alleged an adequate statement of basic facts and law sufficient to support a finding that MCR 3.501(A)(1)(c) and (d) were met. Nonetheless, because the circuit court potentially used an evaluative framework that is inconsistent with this Court's interpretation of the rule, we remand this case to the circuit court so that it may at least clarify its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met, in light of this Court's decision today.[41]

We do not reach the question of if, and to what extent, the issues involved in this case should be "bifurcated." However, we note that it is within the circuit court's discretion to certify a class on a limited basis and to decertify certain members of the class when it deems it appropriate under MCR 3.501(B)(3).[42] Indeed, the circuit court's order suggested that it recognizes

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[41] To the extent that the circuit court determines that the standard it initially used is inconsistent with the proper standard, it should reanalyze all the prerequisites under MCR 3.501(A)(1). If, however, the circuit court determines that its standard was consistent with the proper standard, it should only revisit MCR 3.501(A)(1)(c) and (d) in order to provide further explanation on the record for its conclusion that the prerequisites were met.

[42] Justice YOUNG states that we have "reversed the Court of Appeals majority's decision that bifurcation on damages is required" and, in doing so, violated this Court's procedural rules because the plaintiffs did not file a cross-appeal on this issue. *Post* at 527. We disagree that the Court of Appeals reached a decision on bifurcation that would have required plaintiffs to cross-appeal the issue in order for it to be before this Court.

that it will likely be administratively easier to bifurcate at some point. Given that the most efficient method for conducting the proceedings will likely be affected by how other issues in the case develop, and given the

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We suggest that Justice YOUNG is misreading the Court of Appeals opinions. To the extent that there was a Court of Appeals "decision" on bifurcation, it is because there were two votes in favor of class certification *only* for the issue of liability and two votes against class certification *only* for the issue of whether the commonality prerequisite was met with regard to damages. The Court of Appeals wrote three separate opinions. *Henry v Dow Chem Co*, unpublished opinion of the Court of Appeals, issued January 24, 2008 (Docket No. 266433). Judge KAREN FORT HOOD would have affirmed the trial court's ruling that the class should be certified, without qualification. Judge PATRICK METER, in a partial concurrence and partial dissent, would have certified the class "with regard to defendant's potential liability," but believed that "with regard to damages, individual questions predominate over common questions." *Id.* at 1 (METER, P.J., concurring in part and dissenting in part). Therefore, he believed that "the damages phase, should liability be established, must be dealt with on a case-by-case basis." *Id.* Judge KIRSTEN FRANK KELLY would have reversed the trial court and held that the class could not be certified with regard to any issues because she believed that "individual questions of fact and law predominate over the issues common to the class such that the commonality requirement of MCR 3.501(A) is not met." *Id.* at 1 (K. F. KELLY, J., dissenting).

Given that only one Court of Appeals judge held that bifurcation was necessary, reading the Court of Appeals opinion to have reached a holding regarding bifurcation requires cobbling together three divergent applications of the commonality prerequisite in MCR 3.501(A)(1). If this Court were to reverse the Court of Appeals holding concerning the commonality prerequisite with regard to damages, there would be no Court of Appeals "decision" requiring bifurcation. This Court *specifically granted leave* on whether the commonality prerequisite was met. *Henry v Dow Chem Co*, 482 Mich 1043 (2008) (ordering the parties to address "whether the plaintiffs met all of the requisites for class certification established in MCR 3.501[A][1], including the requirement that questions of law or fact common to the members of the class predominate over questions affecting only individual members [the commonality prerequisite]"). Therefore, to the extent that there was a Court of Appeals holding regarding bifurcation, it is squarely before this Court.

circuit court's extensive familiarity with the complex factual and legal issues presented, we do not think that the circuit court abused its discretion by waiting to determine to what extent bifurcation of the issues involved may be needed.

IV. CONCLUSION

A party seeking class certification bears the burden of establishing that each of the prerequisites for class certification in MCR 3.501(A)(1) is in fact satisfied. It is not sufficient for a certifying court to simply accept a party's assertion that the prerequisites are met. When it is necessary to look beyond a party's assertions in order to assess whether the prerequisites for class certification are met, a certifying court should do so without delving into the merits of the underlying claims involved.

Because the circuit court potentially used an evaluative framework that is inconsistent with this Court's interpretation of the rule and articulation of the proper analysis for class certification, we remand this case to the circuit court so that it may at least clarify its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met, in light of this Court's decision today.

KELLY, C.J., CAVANAGH and HATHAWAY, JJ., concurred with WEAVER, J.

KELLY, C.J. (*concurring*). I fully agree with and sign the majority opinion in this case. I write for the sole purpose of responding to Justice YOUNG's comments regarding the majority's respect for the doctrine of stare decisis. Justice YOUNG repeats a claim that he and Justices CORRIGAN and MARKMAN have published numer-

ous times this term[1] with the same string of citations.[2] The claim is that their colleagues who comprise the majority in this case have been ignoring precedent. A review of the cases in the string citation serves to illustrate that the claim is simply false.

Justice YOUNG claims that in *Vanslembrouck v Halperin*,[3] the Court ignored *Vega v Lakeland Hosps*.[4] However, *Vanslembrouck* is distinguishable from *Vega* because *Vega* determined that MCL 600.5851(1) is a savings provision, whereas *Vanslembrouck* held that MCL 600.5851(7) is a statute of limitations. Thus, these cases examined the effect of altogether different statutory provisions.

Justice YOUNG also claims that in *Hardacre v Saginaw Vascular Services*,[5] the Court failed to follow *Boodt v Borgess Med Ctr*.[6] However, in *Hardacre*, the Court denied leave to appeal because the allegations in the plaintiff's notice of intent to file an action did not need to comply with *Boodt*. In *Hardacre*, the burden of explication of the standard of care was minimal.[7]

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[1] See, e.g., *Petersen v Magna Corp*, 484 Mich 300, 391-392; 773 NW2d 564 (2009) (MARKMAN, J., dissenting); *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009) (CORRIGAN, J., dissenting); *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009) (CORRIGAN, J., dissenting); *Beasley v Michigan*, 483 Mich 1025 (2009) (CORRIGAN, J., dissenting); *Juarez v Holbrook*, 483 Mich 970 (2009) (MARKMAN, J., dissenting). Justice YOUNG joined the dissenting statements in *Chambers*, *Scott*, *Beasley*, and *Juarez*.

[2] *Post* at 528 n 28.

[3] *Vanslembrouck v Halperin*, 483 Mich 965 (2009).

[4] *Vega v Lakeland Hosps at Niles-St Joseph, Inc*, 479 Mich 243; 736 NW2d 561 (2007).

[5] *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009).

[6] *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d (2008).

[7] See *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 694 n 12; 684 NW2d 711 (2004).

Nor did the Court ignore precedents with which it disagrees in *Sazima v Shepherd Bar & Restaurant*.[8] Justice YOUNG claims that the Court failed to follow *Chrysler v Blue Arrow Transport Lines*.[9] However, *Sazima* involved exceptions to the "going and coming" rule as set forth in *Camburn v Northwest School Dist.*[10] Thus, the Court was not bound by *Chrysler*.

Justice YOUNG next claims the Court ignored *Smith v Khouri*[11] when it decided *Juarez v Holbrook*.[12] However, in *Juarez*, it was undisputed that the trial court performed a reasonableness analysis in calculating the proper attorney fee award. Therefore, a remand in light of *Smith* was unnecessary.

Likewise, Justice YOUNG is incorrect in claiming that the Court failed to enforce *Thornton v Allstate Ins Co*[13] and *Putkamer v Transamerica Ins Corp of America*[14] in *Scott v State Farm Mut Auto Ins Co*.[15] In *Scott*, the Court of Appeals undertook a thorough analysis of the relevant no-fault jurisprudence and applied precedent as it has been understood for nearly 30 years.

Finally, the Court did not fail to abide by *Rowland v Washtenaw Co Rd Comm*[16], in *Chambers v Wayne Co Airport Auth*.[17] *Chambers* interpreted MCL 691.1406,

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[8] *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009).

[9] *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606; 295 NW 331 (1940).

[10] *Camburn v Northwest School Dist*, 459 Mich 471, 478; 592 NW2d 46 (1999).

[11] *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

[12] *Juarez*, *supra*.

[13] *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986).

[14] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997).

[15] *Scott*, *supra*.

[16] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

[17] *Chambers*, *supra*.

while *Rowland* interpreted MCL 691.1404(1). Thus, the cases dealt with different statutory provisions and the Court was not bound to extend *Rowland* to the statute at issue in *Chambers*.

In summary, the accusation that the Court has been ignoring precedent is incorrect. Had other justices been in the majority in some of the decisions complained about, they might well have extended existing precedent to a new area of the law. But the refusal of those in the majority in this case to so extend precedent is quite different from a refusal on their part to apply it. This is a distinction that Justices YOUNG, CORRIGAN, and MARKMAN would do well to concede.

YOUNG, J. (*concurring in part and dissenting in part*). In this case, we are asked to review the trial court's certification of a plaintiff class consisting of approximately 2,000 landowners within the flood plain of the Tittabawassee River. The Michigan Court Rules govern the procedure for certifying class actions in Michigan courts. MCR 3.501(A)(1) provides specific prerequisites for proposed plaintiff classes. A party seeking class certification bears the burden of proving that these prerequisites are in fact met and must provide sufficient information to the ruling court for it to make the determination that the prerequisites are met. Because part II of the majority opinion correctly articulates the appropriate appellate standard of review for class certification decisions and part III(A) of the majority opinion correctly articulates the appropriate legal standard a trial court must apply in ruling on a motion for class certification, I join those sections of the majority opinion.

While I would vacate the entirety of the trial court's class certification decision because it committed a legal error by using the wrong legal standard in certifying the

class, the majority determines only that the trial court's analysis of MCR 3.501(A)(1)(c) and (d) was insufficient and requires further explanation. In doing so, the majority also reverses *sub silentio* the determination of the Court of Appeals majority limiting the scope of the proposed class action to issues of liability only. I therefore dissent in part. Because I believe that the trial court's decision was wholly affected by its application of an incorrect standard, I would vacate the class certification in its entirety and remand to the trial court for a completely new ruling on the motion for class certification and limit any certification of the proposed class to issues of liability. The trial court in this case expressly indicated that it *must* "accept the allegations of the plaintiff in support of the motion [for class certification] as true." This is inconsistent with the plain requirement of the court rules, which allow class certification "only if" the prerequisites listed in MCR 3.501(A)(1) are *met*, not merely alleged. I therefore would vacate its class certification regarding liability in its entirety and remand to the trial court so it can apply the appropriate legal standard.

I also dissent from the majority's decision to give discretion to the trial court to certify the class on the issue of damages. The plaintiffs did not cross-appeal the decision of the Court of Appeals majority to vacate class certification on the issue of damages, and therefore this Court cannot vitiate this unappealed ruling of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs commenced the instant action against defendant, Dow Chemical Company, for its alleged pollution of the Tittabawassee River. They claim that the release of dioxin into the Tittabawassee River has

either directly contaminated their properties or has otherwise adversely affected their properties. They subsequently moved for class certification. Plaintiffs' proposed class consists of all owners of real property in Saginaw County within the 100-year flood plain of the Tittabawassee River, as of February 1, 2002.[1] This proposed class contains approximately 2,000 people. Defendant opposed class certification.

After receiving supplemental briefs and hearing oral arguments on the motion for class certification, the Saginaw Circuit Court issued its opinion and order granting class certification on October 21, 2005. At the outset of its analysis, the court explained that it was bound to accept the plaintiffs' allegations supporting its motion for class certification as true:

> Due to the limited case law in Michigan addressing certification of class action lawsuits, the Court can refer to federal case law that interprets the federal rules on class certification. *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997). When evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion as true. The merits of the case are not examined. *Allen v Chicago*, 828 F Supp 543, 550 (ND Ill, 1993). The plaintiff bears the burden of proving that the class should be certified. *Id.*[2]

The court then listed the five requirements of class certification and discussed plaintiffs' allegations regarding each of these requirements. I reprint the trial court's analysis of the five requirements in its entirety:

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[1] A river's "100-year flood plain" is the land area subject to the floodwaters from a flood that has a one percent chance of occurring in any given year. Accordingly, the land at the edge of the 100-year flood plain has a one percent chance of being flooded with water from the Tittabawassee River in any given year, while land closer to the river has a greater chance of being flooded in any given year.

[2] All citations have been converted to this Court's standard format.

a. The first requirement that the Plaintiffs must meet is that "the class is so numerous that joinder of all members is impracticable." MCR 3.501(A)(1)(a). The Plaintiffs define the potential class as:

"All persons who owned real property within the one-hundred year Flood Plain of the Tittabawassee River in Saginaw County, Michigan on February 1, 2002. For purposes of this class definition, the one-hundred year Flood Plain of the Tittabawassee River is defined as the geographic area set forth on the map attached as Exhibit A (Exhibit B attached to this order), which is generally bounded on the west and south by River Road and Stroebel Road, including property on the west and south side of such roads, and generally bounded on the east and north by Midland Road, St. Andrews Road, and Michigan Avenue, including property on the east and north sides of such roads and avenue."

The Plaintiffs also allege and the Court finds that there would be approximately 2,000 persons in the proposed class. The Court finds that the class is so numerous that joinder of all members is impracticable.

b. There are questions of law or fact common to the members of the class that predominate over questions affecting only individual members.

All of the Plaintiffs' claims are based on the allegation that the Defendant polluted the Tittabawassee River, causing damage to the Plaintiffs in the form of reduced value of their home and property. Therefore, the alleged negligence of the Defendant, if any, as to the cause of the alleged pollution is common to all potential Plaintiffs. Equally, any questions of law would be common to the entire class. Although the question of damages may be individualized, the mere fact that damages may have to be computed individually is not enough to defeat a class action. As the Court stated in *Sterling v Velsicol Chem Corp*, 855 F2d 1188, 1197 (CA 6, 1988):

"No matter how individualized the issues of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.

Consequently, the mere fact that questions peculiar to each individual member of the class remaining [sic] after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." See also *Dix v Am Bankers Life Assurance Co*, 429 Mich 410, 417-419; 415 NW2d 206 (1987), and the more recent case of *Mejdrech v Met-Coil Sys Corp*, 319 F3d 910 (CA 7, 2003).

This Court finds that there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members.

c. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

In this case, Plaintiffs contend that their property claims arise from the same course of conduct by Defendant Dow and that they share common legal and remedial theories with the members of the class. The court in *Cook v Rockwell Int'l Corp*, 151 FRD 378 (D Colo, 1993), stated: "So long as there is a nexus between the class representatives' claims [and] defenses and the common questions of fact or law which unite the class the typicality requirement is satisfied (citations omitted) . . . . The positions of the named plaintiffs and the potential class members do not have to be identical. Thus, the requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class. The court finds that the representative parties' claims are not adverse or antagonistic to others in the class. Therefore, the court finds that the claims or defenses of all of the representative parties are typical of the claims or defenses of the class and are not antagonistic to the class."

d. The representative parties will fairly and adequately assert and protect the interest of the class.

There presently are approximately seven Plaintiffs who are the representative parties. Further, no proof has been submitted to this Court that would indicate that the

Plaintiffs herein, the representative parties, would not fairly and adequately assert and protect the interest of the class.

e. The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

To deny a class action in this case and allow the Plaintiffs to pursue individual claims would result in up to 2,000 individual claims being filed in this Court. Such a result would impede the convenient administration of justice. Further, such a procedure would or could result in inconsistent or varying adjudications with respect to individual members of the class. A class action would also assure legal assistance to the members of the class. Moreover, a class action would achieve economy of time, effort and expense. The Court specifically finds that the action would be manageable as a class action based on the facts and the reasons set forth herein. Each member of the class lives in the area alleged to have been damaged. Each member of the class allegedly suffered damages as a result of the release of contaminates in the Tittabawassee River. Almost identical evidence would be required to establish negligence and causal connection between the alleged toxic contamination and Plaintiffs' damages and the type of damages allegedly suffered. The Court stated in *Sterling v Velsicol Chem Corp*, *supra* at 1197:

"In the instant case, each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of ingesting or otherwise using the contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered and the defendant's liability. A single major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. To this extent, a class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts. The district court clearly did not abuse its

> discretion in certifying this action as a rule of [sic] 23(b)(3) class action. However, individual members of the class still would be required to submit evidence concerning their particularized damages, damage claims and subsequent proceedings."
>
> The Court finds that the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[3]

The Court of Appeals rendered three individual opinions in ruling on defendant's appeal. Judge METER and Judge FORT HOOD affirmed the trial court's certification with regard to the issue of Dow's liability,[4] while Judge METER and Judge K. F. KELLY determined that the individual issues predominate over class-wide issues with respect to damages.[5] Defendant appeals the Court of Appeals judgment and claims that the trial court erred in certifying the plaintiff class.[6] It argues that certification should be vacated, first, because the trial court applied an erroneous legal standard in accepting plaintiffs' allegations in support of their motion for class certification as true and, second, because plaintiffs' proposed class fails as a matter of law.

II. STANDARD OF REVIEW

This Court has not expressly established a standard for reviewing certification of a class action, although in a peremptory order we impliedly reviewed a class cer-

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[3] All citations have been converted to this Court's standard format.

[4] *Henry v Dow Chem Co*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2008 (Docket No. 266433) (opinion by FORT HOOD, J.). Accord *id.* (METER, P.J., concurring in part and dissenting in part).

[5] *Id.* (METER, P.J., concurring in part and dissenting in part). Accord *id.* (K. F. KELLY, J., dissenting).

[6] Plaintiffs did not file a cross-appeal of the Court of Appeals' ruling that damages must be determined individually.

tification decision for clear error.[7] The Court of Appeals has accordingly employed a clear error standard.[8] "In Michigan, the clear error standard has historically been applied when reviewing a trial court's factual findings, whereas the abuse of discretion standard is applied when reviewing matters left to the trial court's discretion."[9] I concur in part II of the majority opinion and agree that legal determinations are reviewed under a de novo standard, that findings of fact are reviewed under a clear error standard, and the court's ultimate certification decision is reviewed for abuse of discretion. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.[10]

III. TO BE CERTIFIED AS A CLASS OF PLAINTIFFS IN MICHIGAN COURTS, THE REQUIREMENTS PROVIDED IN MCR 3.501 MUST, *IN FACT*, BE MET

The Michigan Court Rules govern the certification of class actions. MCR 3.501(A)(1) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action *only if*:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

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[7] *Hill v City of Warren*, 469 Mich 964 (2003).

[8] See, e.g., *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002).

[9] *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006).

[10] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[11]

The plain language of MCR 3.501(A)(1) is clear: representative plaintiffs may pursue a class action lawsuit "only if" the enumerated prerequisites have been met.

The procedure for certifying a class in Michigan underscores this requirement. Because a "plaintiff must move for certification that the action may be maintained as a class action,"[12] the plaintiff bears the burden of satisfying the trial court by a preponderance of the evidence that the prerequisites to class certification have been met. Moreover, once the plaintiff moves to certify a class, the trial court "may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures."[13] In other words, MCR 3.501 expressly contemplates that the trial court should make an independent determination that the proposed class meets the requirements for class certification. Thus, a trial court may certify a class only if the plaintiffs have provided sufficient information that each prerequisite to class certification has been met. Because part III(A) of the majority opinion correctly articulates this standard, I join that section of the opinion.

I also concur in the majority's decision to overrule *Neal v James*[14] to the extent it "require[s] a trial court

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[11] MCR 3.501(A)(1) (emphasis added).

[12] MCR 3.501(B)(1)(a).

[13] MCR 3.501(B)(3)(b).

[14] *Neal*, 252 Mich App 12.

to accept as true a plaintiff's bare assertion that a class certification prerequisite is met . . . ."[15] The Court of Appeals in *Neal* held that a trial court must "accept the allegations made in support of the request for certification as true."[16] Although the trial court in the instant case did not expressly indicate its reliance on *Neal*, as a published Court of Appeals decision, it is binding on all lower courts.[17] The requirement in *Neal* that a certifying court is bound to accept the plaintiffs' allegations supporting its motion for class certification as true, however, is inconsistent with the plain meaning of MCR 3.501 as articulated above. Moreover, it cites stale federal precedent for its statement of law.[18] Accordingly,

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[15] *Ante* at 505 n 39.

[16] *Neal*, 252 Mich App at 15. *Neal* has subsequently been cited for this proposition in a published opinion of the Court of Appeals. See *Duncan v Michigan*, 284 Mich App 246, 329; 774 NW2d 89 (2009).

[17] MCR 7.215(C)(2).

[18] Both the *Neal* Court and the instant trial court cited a stale federal district court case for the proposition that a trial court is bound to accept the plaintiff's pleadings on behalf of the motion for certification as true. *Allen v Chicago*, 828 F Supp 543, 550 (ND Ill, 1993) ("In evaluating the motion for class certification, the allegations made in support of certification are taken as true . . . ."). However, the United States Court of Appeals for the Seventh Circuit subsequently undermined *Allen* in *Szabo v Bridgeport Machines, Inc*, 249 F3d 672, 676 (CA 7, 2001), which precluded courts from relying uncritically on the allegations contained in motions for class certification: "Before deciding whether to allow a case to proceed as a class action, . . . a judge should make whatever factual and legal inquiries are necessary under [Federal] Rule [of Civil Procedure] 23." Therefore, even if a Michigan court "can refer to federal cases construing the federal rules on class certification," *Neal*, 252 Mich App at 15, it should look only to cases that *remain* good law.

Applicable federal caselaw does not require that trial courts accept the allegations in support of the motion for class certification as true. Indeed, the United States Supreme Court expressly negated that principle. *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 160; 102 S Ct 2364; 72 L Ed 2d 740 (1982). The Court of Appeals' citation of *Falcon* in *Duskin v*

I concur with the majority that *Neal* is overruled to the extent that it is inconsistent with the rule of law articulated today.

IV. THE TRIAL COURT ERRED BY CERTIFYING THE CLASS TO THE EXTENT IT STATED AND APPLIED AN ERRONEOUS STANDARD OF LAW

A. THE TRIAL COURT ARTICULATED AN ERRONEOUS STANDARD OF LAW

Before certifying the plaintiff class, the trial court sought briefing and conducted extensive oral arguments on the motion for class certification. Nevertheless, even though it did so, the trial court's opinion made no mention of these facts. Instead, the trial court prefaced its ruling by explaining that "[w]hen evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion as true." This statement has meaning, and its meaning completely rebuts plaintiffs' claim that the trial court conducted the appropriate analysis in making its ruling on class certification. The trial court's statement indicates that it approached its analysis without the appropriate analytical independence from plaintiffs'

Dep't of Human Services, 284 Mich App 400, 409; 775 NW2d 801 (2009), is consistent with the use of applicable federal precedent.

While federal caselaw may be helpful in interpreting a similarly worded but ambiguous provision in the Michigan Court Rules, courts must not forget that it is the *Michigan* Court Rules that they are interpreting. Accordingly, federal caselaw interpreting the *Federal* Rules of Civil Procedure can be instructive at most, but never controlling. As explained earlier, the plain language of MCR 3.501(A)(1) requires that the prerequisites for class certification must in fact be met before a trial court can certify a class of plaintiffs. That federal caselaw interprets FR Civ P 23 similarly is fortuitous but ultimately of less import than the actual text of the Michigan Court Rules.

allegations supporting class certification. It is appropriate to vacate the trial court's certification for this legal error alone.[19]

B. THE TRIAL COURT APPLIED AN ERRONEOUS STANDARD OF LAW

Moreover, a critical reading of the trial court's actual ruling underscores the inappropriate deference that the trial court afforded plaintiffs' pleadings on the motion for class certification. For example, in concluding that "there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members,"[20] the trial court merely reiterated plaintiffs' claims without discussing the arguments that defendant proffered in opposition to the motion.

Defendant's trial brief listed several questions of law or fact that it alleged required individualized determination:

> • How each proposed property class member uses and enjoys his, her[,] or its property (when, in fact, there are a vast array of different types of commercial, industrial, agricultural, residential, governmental, non-profit and other entities in the 20-mile-long proposed property class area, and each proposed class member uses and enjoys his, her[,] or its property in ways different from others);
>
> • Whether each proposed class member has suffered a substantial and unreasonable interference with use and

[19] The trial court's statement that "[t]he plaintiff bears the burden of proving that the class should be certified" does not cure any defect it caused by saying it was bound to accept plaintiffs' allegations supporting class certification as true. If plaintiffs' allegations supporting class certification *must* be accepted as true, as the trial court stated, then plaintiffs can meet their burden of proof merely by alleging that the requirements for class certification have been met.

[20] MCR 3.501(A)(1)(b).

enjoyment as a result of misconduct by Dow (when, in fact, such proposed class members already have testified that they have not suffered any such interference, and the alleged interferences from others are highly variable and dissimilar);

• Whether the different levels of dioxin on class properties constitute an unreasonable and substantial interference with use and enjoyment (when, in fact, the levels differ significantly from each other, such that some proposed class members have no level of dioxin on their soil in excess of levels upstream of Dow, some have no level of dioxin on their soil in excess of the [Department of Environmental Quality's (DEQ's)] direct contact criteria, and other proposed class members have higher levels);

• What duty (if any) Dow owes to each particular proposed class member (when, in fact, different types of dioxin have been deposited on different proposed class properties at different times over the past 100 years, by potentially many different entities, who would have faced vastly different standards of care and states of the art at the time of such deposits and, even focusing on the most current version of the DEQ's direct action criteria (which were not applicable until recently), different DEQ criteria apply to different types of property within the class, and those criteria differ from applicable federal criteria);

• Whether Dow violated any duty owed to different proposed class members (when, in fact, the various levels of dioxin on the different properties fall both above and below the various potential standards of care that could have been in effect over the past 100 years);

• Whether any proposed class member's property value was injured (when, in fact, many proposed class members already have sold their class properties at a substantial profit, including some who received more than their asking price and others who have sold for more than their recently appraised value, whereas others have no interest in ever selling their property, and others refuse to sell, and still others contend their property has been rendered "worthless");

* * *

> • Whether and how each proposed class member is situated vis-à-vis Dow's defenses, including the statute of limitations (when, in fact, many proposed class members have believed for many years that Dow polluted the Tittabawassee River, including with dioxin, and thereby diminished the use and enjoyment and value of proposed class properties).

Thus, defendant raised several issues in this case that may require individualized determination, and that therefore may bar class certification under MCR 3.501(A)(1)(b). Even if these concerns ultimately do not preclude class certification, the issues raised are ones that a trial court would have rebutted or explained if it had conducted an independent inquiry into whether the prerequisites of class certification had in fact been met. The trial court's failure to respond to *any* of these claims in its ruling, therefore, belies plaintiffs' contention that the trial court conducted an appropriate analysis of whether plaintiffs' proposed class met the requirements for class certification. Moreover, it belies the majority's assumption that the trial court conducted an appropriate analysis of *some* of the class certification prerequisites, as the predomination prerequisite is one in which the majority concluded that "the circuit court appears to have independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support [the] prerequisite[] . . . ."[21]

Because the trial court failed to address defendant's arguments in opposition to class certification, not only did it *articulate* a legal standard that was inconsistent with the plain meaning of the Michigan Court Rules, but it also *applied* that inappropriate standard in granting class certification. Accordingly, class certification

[21] *Ante* at 506.

must be vacated in its entirety, and this case must be remanded to the trial court for reconsideration of *all* the class certification prerequisites in light of the appropriate legal standard.

C. INSTRUCTIONS FOR REMAND

On remand, the trial court must determine whether plaintiffs' proposed class *in fact* meets the prerequisites for class certification contained in MCR 3.501(A)(1).[22] If the trial court determines that the proposed class meets the prerequisites for class certification, then the trial court may certify the proposed class. However, if it certifies the same class, it may *only* certify that class with regard to the issue of Dow's liability. Two judges on the Court of Appeals held that, as a matter of law, damages must be determined in individual proceedings.[23] I would not disturb that holding; indeed, plaintiffs did not file a cross-appeal to dispute the majority's determination that proceedings to determine damages must be bifurcated from any class action regarding Dow's liability. Accordingly, I would preclude the trial court from certifying the proposed class on the issue of damages, since that legal issue has been settled for the purposes of this litigation.[24]

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[22] Pursuant to MCR 3.501(B)(3)(d)(ii), the trial court may instead divide the proposed class "into separate classes with each treated as a class for purposes of certifying [or] denying certification . . . ."

[23] *Henry*, *supra* (METER, P.J., concurring in part and dissenting in part); *id.*; (K. F. KELLY, J., dissenting).

[24] Moreover, the law of the case doctrine would preclude a subsequent appellate court from certifying the proposed class on the issue of damages. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981) ("[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.").

The majority has reversed the Court of Appeals majority's decision that bifurcation on damages is required. Although it claims that it "do[es] not reach the question of if, and to what extent, the issues involved in this case should be 'bifurcated,' "[25] it does so by subterfuge in claiming that it "do[es] not think that the circuit court abused its discretion by waiting to determine to what extent bifurcation of the issues involved may be needed."[26] This is in direct contradiction of the majority position of the Court of Appeals, which states unequivocally that "with regard to damages, individualized questions prevail."[27] This gross violation of our procedural rules is yet another indication of the majority's now familiar approach to seek its desired result whatever

[25] *Ante* at 507.

[26] *Ante* at 509.

[27] *Henry*, *supra* at 1 (METER, P.J., concurring in part and dissenting in part). Accord *id.* at 6 (K. F. KELLY, J., dissenting). The majority posits that I am "misreading" the Court of Appeals opinions by "cobbling together three divergent" opinions to come to my conclusion that two judges would have reversed the trial court's certification with respect to damages. *Ante* at 508 n 42. I see no other way of interpreting the three Court of Appeals opinions. Though fractured, they reach a clear *result*. Judge FORT HOOD would have affirmed class certification entirely; Judge METER would have affirmed class certification only with respect to questions of liability; and Judge K. F. KELLY would have vacated class certification entirely. While only one Court of Appeals judge specifically mandated "bifurcation," that result is the only way of reconciling the three divergent Court of Appeals positions. In any event, that result was not appealed by the plaintiffs and, as a result of the majority's opinion, plaintiffs are in a better position than they would have been had *defendant* not appealed. The only principled basis for avoiding the Court of Appeals ruling on damages would be if a *different* class were certified. However, this principled approach is unavailable to the majority because it preserves part of the class certification the trial court rendered and requires only that the trial court reconsider portions of its analysis. Thus, unless the trial court declines to certify on remand or certifies a different class, the majority has enhanced plaintiffs' position.

the consequences.[28] The plaintiffs, appellees to this case, have not filed a cross-appeal of the Court of Appeals majority's decision requiring that damages be determined on an individualized basis. It is a basic principle of appellate procedure that appellees who have not cross-appealed "may not obtain a decision more favorable to them than was rendered by the Court of Appeals."[29] The majority's failure to follow this basic

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[28] The majority's determination to ignore facts and precedent inconvenient to its desired outcome has become its *modus operandi*. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where the new majority ignored *Vega v Lakeland Hospitals at Niles & St Joseph, Inc*, 479 Mich 243, 244; 736 NW2d 561 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606; 295 NW 331 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471; 592 NW2d 46 (1999); *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008); *Chambers v Wayne Co Airport Auth*, 483 Mich 1081 (2009), where it failed to follow *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007); and *Scott v State Farm Mut Auto Ins Co*, 483 Mich 1032 (2009), where it failed to enforce *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997). Chief Justice KELLY contends, as she has elsewhere, that "the accusation that the Court has been ignoring precedent is incorrect." *Ante* at 512. See also *Potter v McLeary*, 484 Mich 397, 426-428; 774 NW2d 1 (2009) (KELLY, C.J., concurring) and *Beasley v Michigan*, 483 Mich 1025, 1025-1027 (2009) (KELLY, C.J., concurring). This response has been repeatedly answered in detail. See *Beasley*, 483 Mich at 1027-1030 (CORRIGAN, J., dissenting); *Potter*, 484 Mich at 476-481 (MARKMAN, J., concurring in part and dissenting in part). More importantly, Chief Justice KELLY's response fails to address the fundamental problem that "[leaving] intact precedents that were inconsistent with new decisions essentially allow[s] future litigants to choose among inconsistent precedents as in columns A and B of a Chinese restaurant menu." *Rowland*, 477 Mich at 227 (emphasis and punctuation omitted).

[29] *McCardel v Smolen*, 404 Mich 89, 94-95; 273 NW2d 3 (1978). See also *Pontiac Twp v Featherstone*, 319 Mich 382, 390; 29 NW2d 898 (1947) ("In

principle of law by declaring that the trial court has discretion *not to follow the binding decision of the Court of Appeals*, where the majority does not even state that it is reversing any part of the Court of Appeals' judgment, is contrary to this Court's precedent and unworthy of a Court committed to the rule of law.[30]

V. CONCLUSION

The party seeking certification of a class under MCR 3.501 bears the burden of establishing by a preponderance of the evidence that its proposed class *in fact* meets the requirements for class certification as articulated in the Michigan Court Rules. The trial court, therefore, is not bound to accept the allegations of the moving party, but rather must make an independent finding that the prerequisites of class certification have been met. Because the trial court in the instant case did not make such an independent determination, I would vacate class certification in its entirety and remand this case to the circuit court for further proceedings consistent with this opinion. I would not disturb the Court of Appeals majority's decision that the proposed class may not be certified on the issue of damages.

CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

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the absence of a cross appeal, errors claimed to be prejudicial to appellee cannot be considered nor may appellee have enlargement of relief.").

[30] Our order granting leave to appeal asked the parties to brief four issues. *Henry v Dow Chem Co*, 482 Mich 1043 (2008). Needless to say, due the lack of a cross-appeal, we did not ask the parties to brief whether the Court of Appeals had erred in holding that the trial court had erred in granting class certification regarding the issue of damages. All appellate practitioners should take careful note of today's decision, because an appellant is ending up in a worse position than it was in under the Court of Appeals decision that it appealed, even though no cross-appeal was filed.

CORRIGAN, J. (*concurring in the opinion of* YOUNG, J.). I join Justice YOUNG's opinion in full. I write separately in order to discuss additional issues raised by this appeal that I believe the trial court should consider on remand before again certifying a class in this case. The trial court's October 21, 2005, opinion and order granting class certification formally defined the class to include "all persons who owned real property within the one-hundred year Flood Plain of the Tittabawassee River in Saginaw County, Michigan, on February 1, 2002." The class definition also included a geographic description of the relevant flood plain. But the definition did *not* limit the class to those property owners who are *actually injured* by pollution emanating from the activities of defendant, Dow Chemical Company. Rather, the order defined the class broadly to include all of the approximately 2,000 persons who owned property on approximately 13,000 acres of land. I conclude that such an indiscriminate, overbroad definition of the class failed to comport either with MCR 3.501 or with the precedent cited in the trial court's order because it included numerous class members *with no present injuries*.

Further, such an overbroad class definition would be likely to have significant, negative effects on the hundreds of purported class members who indeed may have no present injuries. It is striking that only about 170 landowners had elected to join this suit as plaintiffs at the time of the trial court's certification decision.[1] The

[1] Indeed, although I agree with Justice YOUNG that the trial court should reconsider whether the proposed class satisfied *each* criterion for class certification on the question of Dow's liability, I agree with the majority that the record presents particularly problematic unanswered questions concerning whether the representative plaintiffs' claims are typical of those of the proposed class, MCR 3.501(A)(1)(c), and whether plaintiffs will "fairly and adequately assert and protect the interests of the class" as class representatives, MCR 3.501(A)(1)(d). See *ante* at 506-507.

owners of property with no present injuries may reasonably wish *not* to be included in the class because certification of their otherwise unharmed property may *itself* guarantee reduction in their property values; these landowners will never recover against Dow because they cannot allege damages under negligence or nuisance theories, but their property values may collapse further simply as a result of their being lumped into the class.

For this reason, if the trial court on remand again concludes that certification of a class is proper, I would direct the court to limit the class to those property owners with *actual injuries* as a result of Dow's activities.

THE ACTUAL INJURY REQUIREMENT

It is axiomatic that each member of a plaintiff class must have suffered an actionable injury, which is a prerequisite of any tort claim. "[C]lass members must have suffered actual injury to have standing to sue . . . ." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999). As the United States Supreme Court opined in *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 156; 102 S Ct 2364; 72 L Ed 2d 740 (1982): "We have repeatedly held that a class representative must be part of the class and possess the same interest and *suffer the same injury* as the class members." (Emphasis added; citation and quotation marks omitted.) Michigan cases similarly require plaintiffs to "demonstrate with common proof that the members of the class have suffered *a common injury*." *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 599-600; 654 NW2d 572 (2002) (emphasis added).

Likewise, the federal toxic tort cases relied on by plaintiffs and the trial court involved certification of classes explicitly defined by reference to the members'

present injuries. For example, the discussion in *Sterling v Velsicol Chem Corp*, 855 F2d 1188, 1197 (CA 6, 1988), which the trial court quoted at length in its October 21, 2005, order, addressed a class of residents who alleged that they "suffered damages as a result of ingesting or otherwise using . . . contaminated water." *Sterling* involved plaintiffs who lived near a landfill from which toxic chemicals seeped into the ground, contaminating soil and groundwater. Much as in the present case, because several wells near the site tested positive for contamination, all residents within 1,000 acres of the site were advised to stop using their wells for any purpose. Several residents sued under theories including nuisance and negligence. *Id.* at 1192-1194. The United States Court of Appeals for the Sixth Circuit affirmed class certification. But the class did not indiscriminately include *every* resident within the 1,000-acre area; rather, *Sterling*'s discussion and holding presuppose that each class member had a present injury because "each class member lived in the vicinity of the landfill *and* allegedly *suffered damages as a result of ingesting or otherwise using* the contaminated water." *Id.* at 1197 (emphasis added). Similarly, the class in *Olden v Lafarge Corp*, 383 F3d 495, 507 (CA 6, 2004), was expressly defined as "all owners of single family residences in the City of Alpena whose persons or property *was damaged* by toxic pollutants and contaminants which originated from the Lafarge cement manufacturing facility . . . ." (Emphasis added.) In contrast, as noted, the class certified here broadly included "all persons who owned real property" within the 100-year flood plain, without reference to whether such persons could allege harm as a result of Dow's activities. Because it is apparent that such an overbroad class cannot all allege cognizable claims, I conclude that plaintiffs' proposed class definition is flawed.

PRESENT INJURIES UNDER THE TORTS ALLEGED

Plaintiffs sued under negligence and nuisance theories. To prove negligence, "a plaintiff must demonstrate a present physical injury to person or property *in addition to* economic losses that result from that injury." *Henry v Dow Chem Co*, 473 Mich 63, 75-76; 701 NW2d 684 (2005) (*Henry I*) (emphasis in original). *Henry I* created a bright line rule by unambiguously requiring a plaintiff alleging negligence to prove *present physical injury*. Here, plaintiffs cannot show that each land parcel in the 100-year flood plain is presently contaminated with pollution alleged to have originated from Dow's activities. Indeed, studies by the Michigan Department of Environmental Quality (DEQ) expressly show that some of the land is *not* contaminated. Because the owners of uncontaminated property do not have present physical injuries, they cannot allege negligence under Michigan law.

Accordingly, plaintiffs argue that even the uncontaminated properties suffer present injury in fact under a nuisance theory because they may become contaminated in the future. But Dow correctly argues that the purported injury in fact to many of these properties is too speculative to be recognized in Michigan.

To prove private nuisance, a plaintiff must show substantial interference with the use and enjoyment of his land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 303-304; 487 NW2d 715 (1992).[2] Because a nuisance is a "nontrespassory invasion," a plaintiff need not show *physical* intrusion upon his land to prove nuisance. *Id.* at 302.

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[2] Public nuisance, on the other hand, requires proof of an "unreasonable interference with a right common to all members of the general public." *Adkins*, 440 Mich at 304 n 8. Plaintiffs alleged both public and private nuisance theories.

> There are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment. [*Id.* at 303.]

Significantly, although nuisance may involve " 'threatening or impending danger,' " *id.*, quoting *Kilts v Kent Co Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910), a plaintiff cannot prove nuisance "where damage and injury are both predicated on unfounded fear of third parties that depreciates property values," *id.* at 312. "[P]roperty depreciation alone is insufficient to constitute a nuisance." *Id.* at 311.

Here, the facts presented by plaintiffs do not suggest that all or even most of the 2,000 proposed class members can allege cognizable nuisance claims. As noted, the DEQ reports that many parcels of land are not physically contaminated. Many more parcels have not even been tested, were never subject to flooding, and are very unlikely to experience flooding even during the next *century*. Crucially, the DEQ's restrictions apply *only* to *contaminated* or *frequently flooded* land—not to *all* land in the 100-year flood plain.[3] Because the class

[3] The March 15, 2004, declaration of Andrew W. Hogarth, chief of the DEQ's Remediation and Redevelopment Division, specifies that only "locations where dioxin concentrations exceed the residential direct contact criteria" are a designated "facility" for purposes of state restrictions on contaminated land, which include the requirement to inform potential buyers of dioxin contamination. He states that the DEQ also "believes" that property "subject to frequent flooding by the Tittabawassee River downstream of Midland is a facility." He avers that residents were specifically informed of these definitions in the DEQ's June 2003 Information Bulletin No. 3. As Dow observes, there is no evidence to suggest that uncontaminated property with a low likelihood of flooding in a given year is "subject to frequent flooding" or otherwise designated a "facility" by the DEQ's terms. Similarly, the DEQ's Information Bulletin No. 4, dated March 2004, identified precautions that residents of the

was defined on the sole basis of the geographic boundaries of the 100-year flood plain, much of the circumscribed land has only a one percent chance of flooding in a given year. See *ante* at 514 n 1 (YOUNG, J.). Moreover, the degree of risk of *contamination* from *future* flooding is questionable and somewhat speculative; Dow has already altered its activities and begun remediating past contamination of the river as was required, in part, by the DEQ.[4]

Accordingly, although some landowners may be able to allege present harm from nuisance, many residents of the flood plain certainly cannot. Indeed, the land that is not presently contaminated, that has a low risk of flooding in the future, and that has a largely speculative risk of actual contamination as a result of future flooding, is comparable to the land in *Adkins* where the plaintiffs sought damages based on diminished property values they alleged were caused by contamination in the surrounding area. These plaintiffs' land was not actually contaminated; a groundwater divide prevented the migration of toxic chemicals from the surrounding land. *Adkins*, 440 Mich at 299-300, 318. The Court held that fear-based diminution in property values was an insufficient basis for relief, stating:

> Under such a theory, a cause of action could be stated on behalf of any individual who could demonstrate an effect on property values even if the polluted ground water had

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flood plain could take "to reduce exposure to dioxins *from the identified areas of contamination*." (Emphasis added.) By their terms, these guidelines do not apply to uncontaminated soil.

[4] I also note, as the DEQ observed in its June 2003, Phase II Final Report, the presence of uncontaminated properties within the 100-year flood plain that are elevated above the flood level as a result of "local natural features or the introduction of clean fill material." Obviously these properties also have a low risk of future contamination from flooding.

> neither strayed from defendants' own property, nor disturbed a plaintiff's enjoyment by the fear that it would do so.
>
> If any property owner in the vicinity of the numerous hazardous waste sites that have been identified can advance a claim seeking damages when unfounded public fears of exposure cause property depreciation, the ultimate effect might be a reordering of a polluter's resources for the benefit of persons who have suffered no cognizable harm at the expense of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property. [*Id.* at 318-319.]

The very problem identified in *Adkins* is present here. Plaintiffs argue that property values throughout the flood plain have been diminished in part as a result of DEQ warnings to residents concerning possible contamination and steps residents should take to avoid harmful exposure to dioxin-contaminated soil; residents were told, for example, that children and gardeners should avoid prolonged exposure to *contaminated* soil and that certain steps were required if residents wished to move or dispose of such soil. But the DEQ itself *also* reported that various areas of the flood plain were *not* harmfully contaminated, and the state-promulgated restrictions applied only to contaminated or, at most, frequently flooded land. Indeed, the depositions of some flood plain residents explicitly revealed that these residents were not directly affected by pollution and had not altered the use of their land in any way as a result of Dow's alleged polluting activities. Thus, many proposed class members would be able to argue *at most* that their property values decreased simply as a result of publicity concerning pollution of the Tittabawassee River in part due to this lawsuit. But this is precisely the sort of unfounded fear that the *Adkins* Court concluded could not underlie a nuisance claim.

Finally, the 170 or so plaintiffs who moved for class certification risk the very problem identified in *Adkins*; by attempting to certify 2,000 class members, most of whom obviously had not yet chosen to participate in the suit and many of whom may not be able to allege damages from present injuries, the plaintiffs virtually guarantee both that Dow's resources will be stretched to defend uncognizable claims at the expense of those plaintiffs who suffer actual harm *and* that any fear-based diminution in property values throughout the flood plain will accelerate as a result of the overbroad class definition.[5] Indeed, not only does the proposed class definition incorrectly suggest that undamaged land is indeed damaged in some way, but the definition likely would suspend all flood plain residents' abilities to sell undamaged land throughout the pendency of this suit, which is already over six years old.

CONCLUSION

For these reasons, I conclude that the class proposed by plaintiffs is too broad and therefore is untenable. Significantly, it is not even clear that the trial court intended to accept plaintiffs' broad proposed definition when it initially certified the class. I note that the October 21, 2005, order refers to two defining characteristics of the class, one largely geographic but the other apparently based on present injury: "Each member of the class lives in the area alleged to have been damaged. Each member of the class allegedly *suffered damages* as a result of the release of contaminates in

[5] Dow posits that the 100-year flood plain is too broad an area for a fact-finder to conclude that *every* owner suffers a present, nonspeculative injury sounding in nuisance. Dow reasonably asks: why not the 1,000-year or 1-million-year flood plain? Conversely, plaintiffs would be more likely to properly define a geographically based class if they focused merely on the 10- or 20-year flood plain.

the Tittabawassee River." (Emphasis added.) Accordingly, if the trial court again concludes on remand that class certification is appropriate, I would direct the court to explicitly limit any class definition to property owners who suffer present injuries.

MARKMAN, J., concurred with CORRIGAN, J.

WEAVER, J. I write this separate opinion with regard to the issue of my participation in this case.

In preparation of my 2008 income taxes, it came to my attention that I own 108 shares of Dow Chemical, which I received through a recent inheritance. After I became aware of this information, I asked the Clerk of the Court, Corbin Davis, to notify the parties to this case. Below is a copy of the disclosure statement sent to the parties by Mr. Davis on April 15, 2009:

> Justice Weaver has requested that I inform you of the following:
>
> In preparation of her 2008 income taxes, it has come to Justice Weaver's attention that she now owns 108 shares in Dow Chemical, which she received through a recent inheritance. Justice Weaver has informed me that she did not own any Dow Chemical stock at the time she sat on this matter in a prior appeal. *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005).
>
> She has been informed that this stock is currently worth approximately $10.94 per share, thus making the total value of her stock $1,181.52. Pursuant to the Code of Judicial Conduct Canon 3(C):
>
> "A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)."
>
> MCR 2.003(B)(5) provides in part that a judge is disqualified when:

> "The judge knows that he or she . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding."
>
> Justice Weaver believes that the amount of stock she owns in Dow Chemical is not a "more than de minimis interest" that could be substantially affected by this proceeding.
>
> She also states that she has no personal bias or prejudice for or against either party and, therefore, finds no need to recuse herself in this case. However, should either of the parties desire that she recuse herself, she is willing to do so.
>
> Please advise me of your preference in this matter at your earliest convenience.

Justice YOUNG also sent a separate statement to the parties expressing his disagreement with my decision to notify the parties in this manner. Both parties responded that they had no objection to my continued participation in this case.

I bring this issue to the public's attention because it is another example of why this Court needs fair, clear, written rules for disqualification concerning the participation or nonparticipation of Michigan Supreme Court justices. Since May 2003, I have repeatedly called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the need to have written, clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.[1] See, e.g., the statement or opinion by WEAVER, J.,

[1] Justice YOUNG now asserts that he feels an "ethical obligation" to raise questions about the manner in which I have handled the issue of my participation in this matter. *Post* at 541 n 1. However, I again note that since 2003, I have raised the issue of the need for clear, written, and fair disqualification rules for Michigan Supreme Court justices, but the "majority of four" (Justice YOUNG, along with Justices CORRIGAN and

in *In re JK*, 468 Mich 202, 219-225; 661 NW2d 216 (2003); *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96-104; 693 NW2d 358 (2005); *McDowell v Detroit*, 474 Mich 999, 1000 (2006); *Stamplis v St John Health Sys*, 474 Mich 1017, 1017-1018 (2006); *Heikkila v North Star Trucking, Inc*, 474 Mich 1080, 1081 (2006); *Lewis v St John Hosp*, 474 Mich 1089, 1089-1090 (2006); *Adair v Michigan*, 474 Mich 1027, 1044-1051 (2006); *Grievance Administrator v Fieger*, 476 Mich 231, 328-347; 719 NW2d 123 (2006); *Grievance Administrator v Fieger*, 477 Mich 1228, 1231-1271 (2006); *People v Parsons*, 728 NW2d 62, 62-65 (2007); *Ruiz v Clara's Parlor, Inc*, 477 Mich 1044 (2007); *Neal v Dep't of Corrections*, 477 Mich 1049, 1049-1053 (2007); *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1070-1071 (2007); *Ansari v Gold*, 477 Mich 1076, 1077-1079 (2007); *Short v Antonini*, 729 NW2d 218, 219-220 (2007); *Flemister v Traveling Med Services, PC*, 729 NW2d 222, 223-225 (2007); *McDowell v Detroit*, 477 Mich 1079, 1084-1086 (2007); *Johnson v Henry Ford Hosp*, 477 Mich 1098, 1099-1100 (2007); *Tate v Dearborn*, 477 Mich 1101, 1102-1103 (2007); *Dep't of Labor & Economic Growth v Jordan*, 480 Mich 869, 869-873 (2007); *Cooper v Auto Club Ins Ass'n*, 739

Markman and former Chief Justice TAYLOR) refused to address the issue until 2006, when this Court worked on the issue of disqualification, and the "majority of four" refused to publish the proposed disqualification rules formulated by members of this Court.

In March of this year (2009), after former Chief Justice TAYLOR's removal from this Court as a result of his overwhelming defeat in the 2008 election, the "remaining three" (Justice YOUNG, along with Justices CORRIGAN and MARKMAN) voted against publishing proposed rules for disqualification. Fortunately, this year, a majority voted in March 2009 to publish for public comment until August 1, 2009, the three proposals for rules of disqualification to be considered at a public hearing later in 2009.

NW2d 631, 631-633 (2007); and *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960, 962-964 (2008).

YOUNG, J. I write separately to respond to Justice WEAVER's separate opinion.

It would appear from Justice WEAVER's separate opinion that I opposed the communication of her late-discovered ownership interest in one of the parties. She states: "Justice YOUNG also sent a separate statement to the parties expressing *his disagreement with my decision to notify* the parties in this manner." *Ante* at 539 (emphasis added). This is patently untrue, as Justice WEAVER knows. What I challenged was the *inadequacy* of her disclosure to the parties concerning the nature of her ownership of stock in Dow Chemical. For example, she did not disclose when she actually became the legal owner of stock in Dow Chemical or precisely when she discovered she had this ownership interest. Moreover, she did not disclose the basis for her unilateral determination that her ownership interest is not a "more than de minimis interest" or *why any ownership interest was not itself disqualifying*. In order to ensure that the context of my criticism of her disclosure is provided, I am publishing my own communication to the parties below.

I continue to question Justice WEAVER's participation in this case.[1] I believe that *any* ownership interest in a

[1] While, consistent with my previous practice, *Adair v Michigan*, 474 Mich 1027, 1052 (2006) (statement of YOUNG, J.), I do not "vote" on Justice WEAVER's disqualification in this case, I believe I do have an ethical obligation to raise questions about her decision. I note that, contrary to their participation in *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 45, 47; 773 NW2d 243 (2009), where the Chief Justice and Justice CAVANAGH concurred in and signed Justice HATHAWAY's decision to participate, here they have not joined in

party precludes a judge's participation. MCR 2.003(B)(5) provides that a judge is disqualified when "[t]he judge knows that . . . she . . . has an economic interest in . . . a party to the proceeding or has any other more than a de minimis interest that could be substantially affected by the proceeding." This court rule is written in the disjunctive, which distinguishes an economic interest in a party from every other type of potentially disqualifying interest. Only those "other" types of interests contain an exception for de minimis interests. Without doubt, Justice WEAVER has an "economic interest in . . . a party" in this proceeding.

This qualitative distinction made in MCR 2.003(B)(5) between economic interests and other interests is similarly found in the nearly identical federal statute regarding judicial recusal.[2] 28 USC 455(b)(4) disqualifies a federal judge from sitting in a case if he or she "has a financial interest in the subject matter in controversy . . . ." The statute defines "financial interest" as "ownership of a legal or equitable interest, however small." 28 USC 455(d)(4). The United States Court of Appeals for the Tenth Circuit has determined that the federal statutory scheme

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Justice WEAVER's decision to participate. I have no idea why these justices have chosen to vote on the disqualification in the one case but have declined to do so in this instance.

[2] Compare 28 USC 455(b)(4), which provides that a judge shall disqualify himself when "[h]e knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," with MCR 2.003(B)(5), which provides that a judge is disqualified when "[t]he judge knows that he . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding." The federal statute was enacted in 1948 and the Michigan court rule was amended in 1995 in light of the 1990 ABA Model Code of Judicial Conduct, which, in pertinent part, was taken from the federal statute.

> differentiates between two kinds of interests. If the judge has direct ownership, legal or equitable, then disqualification is required regardless of the size of the interest, unless one of the specified exceptions applies. On the other hand, an interest not entailing direct ownership falls under "other interest," and requires disqualification only if the litigation could substantially affect it.[3]

Furthermore, the leading commentators on federal practice and procedure indicate that this statutory provision

> eliminate[s] any dispute about the substantiality of a financial interest. If a judge, or any other person within the statutory language, has *any* financial interest, as that term is defined, however small, in a party or in the subject matter in controversy, the judge must recuse. There is no room for discretion.[4]

Under MCR 2.003(B)(5) there was no discretion here for Justice WEAVER's continued participation.

MY STATEMENT TO THE PARTIES

My response, also communicated to the parties, challenging Justice WEAVER's disclosure to the parties concerning her stock ownership is restated here as follows:[5]

> In light of her repeated public statements regarding standards for recusal, I regret that Justice Weaver has placed the parties in the awkward position of having to decide whether she will take part in the decision of this

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[3] *In re New Mexico Natural Gas Antitrust Litigation*, 620 F2d 794, 796 (CA 10, 1980). This is the *same* distinction made in MCR 2.003(B)(5).

[4] Wright and Miller, 13D Federal Practice and Procedure (3d ed), § 3546, pp 76-78 (emphasis in original; citations omitted).

[5] My communication to the parties begins with endnote 2 because Justice WEAVER's communication contained one citation and the citations were numbered continuously. Additionally, all citations in the communication have been converted to this Court's standard format.

case notwithstanding her acknowledged financial interest as an investor in the defendant corporation. I ask that the following public information regarding Justice Weaver's stated positions on recusal be taken into consideration in making a decision on her request for remittal.

While I have publicly supported the Court's more than a century old recusal policy,[2] Justice Weaver has been equally publicly critical of that longstanding policy in suggesting that she subscribes to a "higher" standard.[3]

Nevertheless, Justice Weaver claims that her ownership of approximately $1,200 in defendant Dow's stock is "not a 'more than de minimis interest.' " She has made this determination herself, which is contrary to her repeated public statements on the question of judicial recusal.[4]

For example, in this Court's March 18, 2009 order on ADM 2009-04 (Proposed Disqualification Rules for Justices), Justice Weaver reiterated her 2006 statement on disqualification and explained that "[i]t is a most basic truth that the person who may be the least capable of recognizing a justice's actual bias and prejudice, or appearance of bias and prejudice, is the justice h[er]self."[5] Presumably consistent with that sentiment, she recused herself in *Kyser v Kasson Twp*, "because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family."[6]

Moreover, Justice Weaver has advocated a disqualification standard that requires judges to recuse themselves if there is merely an *appearance* of impropriety. She has cited with approval Canon 2 of the ABA Model Code of Judicial Conduct, which states that "[a] judge shall avoid . . . the appearance of impropriety in all of the judge's activities" and Model Canon 3(E)(1), which states that a judge "shall disqualify . . . herself in a proceeding in which the judge's impartiality might reasonably be questioned."[7]

The disqualification standard that she has publicly championed is an *objective* standard, not a subjective standard to be determined by her say-so. Justice Weaver's "appearance of impropriety" standard is made without

regard to whether an individual judge harbors an *actual* bias toward any party in the case being heard:

"[W]hen a judge recuses . . . herself to avoid the appearance of impropriety, the result is that the judge avoids *risking* actual bias. Second, when a judge recuses . . . herself, the judge eliminates the *appearance* of impropriety and thereby engenders public confidence in the judiciary."[8]

Accordingly, if her support of the "appearance of impropriety" standard is genuine — and I assume that she would not have advocated it otherwise — her *personal* belief that she "has no personal bias or prejudice for or against either party" and that the total value of her stock is "not more than a de minimis interest" is irrelevant to whether she must recuse herself.

Moreover, Justice Weaver has advocated in her various published statements on disqualification standards that the disqualification decision cannot be solely vested in the judge who is the subject of disqualification but must be reviewed by other members of the Court.[9]

Here, Justice Weaver has made her own determination that her Dow stock ownership is "de minimis" within the meaning of MCR 2.003(B)(5). But there is no basis upon which an objective observer can assess the validity of her claim and decision. Context is essential in considering what level of ownership in a party litigant is "de minimis," and no one but Justice Weaver is privy to her financial status — something she has chosen not to share.

My point here is that Justice Weaver's request for remission is entirely inconsistent with her published views on what standards *ought* apply in recusal situations. Her ownership of stock in a party defendant does pose an *appearance* of impropriety from the standpoint of the public.[10] Can anyone imagine the public at large believing that it is perfectly appropriate for a judge to decide a case in which she owns stock in one of the parties?[11] Moreover, her communication — which states her conflict, announces that her conflict does not matter, and asks the parties to agree with her — is inherently intimidating and coercive to both parties involved in this litigation.[12] Rejection of her

stated premise — that, notwithstanding her stated conflict, she should participate in the case — obviously puts the parties in the position of offending a sitting Justice. By her own stated positions on recusal, she should not be putting the parties in the position of having to bless an *appearance* of impropriety.

Finally, the nature of Justice Weaver's private communication with the parties does not comport with her conclusion that the Michigan Constitution, art 6, § 6, "requires that a justice's self-initiated decision and reasons not to participate, or a challenged justice's decision and reasons to participate or not participate, should be in writing and *accessible to the public*."[13] It would seem to me that, under her proposed regime, Justice Weaver's discussion of her stock ownership should be published for public review.

Again, I wish to state that I believe that our historic disqualification policy is constitutionally sound and should be embraced by all members of this Court. Since it has not been, and since Justice Weaver has articulated her own, purportedly "higher" recusal standards, I am left to wonder why Justice Weaver advocates a public position contrary to the position she practices and why she believes it appropriate that the parties should be asked to bless her conflict.

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[2]"In short, a justice confronted with a disqualification motion has typically consulted with members of the Court and made a determination whether participation in a particular matter was appropriate. Other than providing counsel, other members of the Court have not participated in the decision." ADM 2009-04, order of the Michigan Supreme Court, March 18, 2009, p 33 ("March 18, 2009 order") (statement of Young, J.). See also *Adair v State of Michigan*, 474 Mich 1027, 1052 [2006] (statement of Young, J.).

[3]See, e.g., March 18, 2009 order, *supra* at 9 n 1 (statement of Weaver, J).

[4] So far as I am aware, Justice Weaver did not consult with any member of this Court before announcing her position.

[5] March 18, 2009 order, *supra* at 14.

[6] *Kyser v Kasson Twp* [483 Mich 903 (2009) (order denying leave)] and [483 Mich 983 (2009) (order vacating denial order and granting leave)]. Justice Weaver did not disclose the nature of her "business relationship" that warranted her recusal.

[7] See *Adair v State of Michigan*, 474 Mich 1027, 1047 (2006) (statement of Weaver, J.). Justice Weaver does not subscribe to my view that, because Justices cannot be replaced on a case by case basis, a different rule of disqualification must apply to Justices. See *id.* at 1044-1045. On the contrary, she advocates that a disqualified Justice *can* be replaced in such a case.

[8] *Id.* (Emphases added.) Justice Weaver claims that she "has no personal bias or prejudice for or against either party . . . ." Nevertheless, her lack of *actual* bias in this case is irrelevant under her disqualification standard to the question whether the participation of a judge who has an ownership interest in a litigant creates an *appearance* of impropriety.

[9] March 18, 2009 order, *supra* at 13-14. This, of course, is one of the issues pending in *Caperton v Massey*, United States Supreme Court Docket No. 08-22, where it is claimed that due process requires that a recusal issue must be decided by someone other than the judge who is the subject of potential disqualification.

[10] Indeed, Congress has made this very policy judgment. 28 USC 455(b)(4) disqualifies a federal judge from sitting in a case if he or she "has a financial interest in the subject matter in controversy." The statute defines "financial interest" as "ownership of a legal or equitable interest, however small." 28 USC 455(d)(4). While this federal statute is not controlling here as our disqualification rule for Michigan judges permits a "de minimis" financial interest, it does provide support for the proposition that even a small financial stake in a party litigant creates an appearance of impropriety.

[11] As stated, Justice Weaver provides the parties with no basis upon which to evaluate her request for remission.

[12] I am aware that this procedure is specifically contemplated by MCR 2.003(D). Nevertheless, if Justice Weaver's standard for recusal is the *appearance* of impropriety, then submitting this question to the parties becomes moot and is inherently aimed at coercing the parties to accept her participation *notwithstanding* the appearance of impropriety.

[13] *Adair*, 474 Mich at 1050 (statement of Weaver, J.) (emphasis added).

PEOPLE v IDZIAK

Docket No. 137301. Argued April 7, 2009 (Calendar No. 4). Decided July 31, 2009.

Patrick L. Idziak pleaded guilty in the Kent Circuit Court to armed robbery and possession of a firearm during the commission of a felony, both committed while he was on parole. After sentencing the defendant, the court, Donald Johnston, J., did not grant him credit against the new sentences under MCL 769.11b, the jail credit statute, for the 98 days he spent in jail between his arrest and sentencing, concluding that parole detainees were not entitled to the credit. The court also concluded that it lacked common-law discretion to award credit. The Court of Appeals denied the defendant's application for leave to appeal in an unpublished order, entered July 25, 2008 (Docket No. 285975). The Supreme Court granted the defendant leave to appeal. 483 Mich 885 (2009).

In an opinion by Justice CORRIGAN, joined by Justices WEAVER, YOUNG, and HATHAWAY, the Supreme Court *held*:

A parolee who is convicted of a felony committed while on parole and sentenced to a term of imprisonment is not entitled under MCL 769.11b to credit against his or her new minimum sentence for the time spent in jail between the parolee's arrest for the new offense and sentencing for that offense. A sentencing court lacks common-law discretion to grant credit against the parolee's new minimum sentence, and the denial of credit is not a double jeopardy or equal protection violation.

1. Under MCL 791.238(2), a parolee convicted of and sentenced for an offense committed while on parole resumes serving the unexpired portion of his or her original maximum sentence when the parolee is arrested for the new offense. The parolee thus remains incarcerated regardless of whether he or she would otherwise be eligible for bond before conviction of the new offense. Therefore, the parolee is incarcerated not "because of being denied or unable to furnish bond," but for independent reasons, and MCL 769.11b does not apply. The defendant is not entitled under that statute to credit against his new minimum sentence for the time he spent in jail awaiting sentencing on the new offenses.

2. Because the comprehensive statutory scheme pertaining to

parolees dictates that the defendant's 98 days in jail were served against his original maximum sentence, the sentencing court had no discretion to circumvent the operation of that statutory scheme.

3. The defendant was not subjected to multiple terms of confinement for his new offenses because he continued to serve out his earlier sentence after he was arrested. Thus, there was no double jeopardy violation.

4. Parolees are situated differently from criminal defendants who are not on parole. Parole is a conditional permission to leave prison, and a parolee continues serving out his or her sentence. Because parolees receive credit against their earlier sentence under MCL 791.238(2) and defendants who are not on parole receive jail credit under MCL 769.11b, both parolees and defendants who are not on parole receive credit for time served. It was rational for the Legislature to treat parolees and defendants who are not on parole differently in this regard. No statute makes a distinction between a parolee who pleads guilty and one who chooses to go to trial. To the extent that the denial of jail credit against a parolee's new minimum sentence results in some parole violators reaching parole eligibility earlier than others because of arbitrary factors, it does not amount to a violation of equal protection. Any difference in treatment does not arise from a classification created by the Legislature.

Affirmed.

Chief Justice KELLY, joined by Justice CAVANAGH, concurring in part and dissenting in part, agreed that a parolee incarcerated on new charges is not entitled to credit under MCL 769.11b for time spent in jail awaiting trial. The reason, however, is because that time should be considered time served toward the parolee's aggregate minimum sentence calculated under MCL 791.234, which must be served before he or she is again eligible for parole. Therefore, receiving credit for the time spent in jail would allow the parolee double credit for the same time. Chief Justice KELLY noted that it was thus unnecessary to address the defendant's constitutional challenges, but also stated that the current application of the consecutive sentencing scheme for parolees may be unconstitutional because of disparate treatment of similarly situated parolees. The Parole Board should be directed to recalculate the defendant's parole-eligibility date.

Justice MARKMAN, dissenting, disagreed with the conclusion that MCL 769.11b does not apply to a defendant who spends time in jail awaiting sentencing for a new crime committed while on parole. The statute entitles any person who is denied or unable to

furnish bond for the offense of which the person is convicted to receive the credit regardless of the reason the person cannot post bond for the new offense. It does not require that the defendant be denied or unable to post bond because of the offense of which the defendant is convicted, such as because of a parole detainer. Since the defendant in this case was unable to furnish bond, he should have received credit against his new sentence for the time spent in jail. Additionally, under MCL 768.7a(2), the Parole Board should be ordered to undertake an affirmative determination of what is the "remaining portion" of the defendant's original sentence that he must serve. Only after the defendant completes the remaining portion of his first sentence can his new sentence begin and the jail credit be applied. Once the defendant begins his new sentence and serves an amount of time equal to the new minimum term, he will then become parole eligible under MCL 791.234(3). This interpretation of these three statutes, unlike that of the majority, gives full effect to a difficult and complex sentencing scheme established by the Legislature for parole violators. Equally significantly, the majority's opinion fails to address the Parole Board's practice of arbitrarily determining how much time remains to be served on a parolee's first sentence, which leads to a situation in which identically situated defendants may be treated in a widely disparate fashion with respect to eligibility for parole because of entirely arbitrary and serendipitous factors unrelated to a defendant's culpability or the severity of a defendant's crimes.

PAROLE — JAIL CREDIT STATUTE — CREDIT FOR TIME SERVED AWAITING TRIAL ON A NEW OFFENSE.

A parolee who is convicted of and sentenced to a term of imprisonment for an offense committed while on parole resumes serving his or her original maximum sentence on the date the parolee is arrested for the new offense; the parolee is not entitled to credit against his or her new minimum sentence for the time served in jail between arrest and sentencing on the new offense (MCL 769.11b, 791.238[2]).

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State Appellate Defender (by *Jeanice Dagher-Margosian*) for the defendant.

Amici Curiae:

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Henry Boynton*, Assistant Solicitor General, and *Charles C. Schettler, Jr.*, Assistant Attorney General, for the Department of Corrections.

Stuart G. Friedman for Criminal Defense Attorneys of Michigan.

Curtis L. Munson, *in propria persona*.

CORRIGAN, J. In this case, we consider whether a parolee who is convicted of and sentenced to a term of imprisonment for a felony committed while on parole is entitled, under Michigan's jail credit statute, MCL 769.11b, to credit for time served in jail after his arrest on the new offense and before sentencing for that offense. We hold that, under MCL 791.238(2), the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense. As long as time remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it. Since the parolee is not being held in jail "because of being denied or unable to furnish bond," the jail credit statute does not apply.

Further, a sentencing court lacks common law discretion to grant credit against a parolee's new minimum sentence in contravention of the statutory scheme. Finally, the denial of credit against a new minimum sentence does not violate the double jeopardy clauses or the equal protection clauses of the United States or Michigan constitutions. US Const, Ams V and XIV; Const 1963, art 1, §§ 2 and 15.

I. FACTS AND PROCEDURAL HISTORY

About 3:00 a.m. on November 23, 2006, while defendant was on parole,[1] he confronted Brenda Young, an employee of the Bow Tie Tavern in Alpine Township, Kent County, as she was closing the bar for the night. She was the only person still present in the bar. Defendant approached Young with a shotgun when she opened the back door to take out the trash. He questioned her about the keys to the jukebox, pool table, cigarette machine, and lottery machine. She told him that she only had the key to the lottery machine. She opened the machine, surrendering the cash inside. Defendant pried open the jukebox with a crowbar and took the cash inside. He then tied up Young and stole her car. She freed herself about 40 minutes later and called the police. An investigation revealed defendant's involvement in the crime, and police arrested him on November 28, 2006.

Defendant pleaded guilty to armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. On March 6, 2007, the court sentenced him to a term of 12 to 50 years' imprisonment for the armed robbery conviction and the mandatory consecutive two-year term for the felony-firearm conviction. The sentencing court did not grant defendant credit against the new sentences for the 98 days he spent in jail between his arrest and sentencing.

Defendant's appellate counsel moved for postjudgment relief, arguing that jail credit was mandatory under MCL 769.11b and, in the alternative, that the court had discretion to award credit. Citing *People v Seiders*, 262 Mich App 702; 686 NW2d 821 (2004), and *People v Filip*, 278

[1] Defendant's lengthy criminal history includes 13 prior felony convictions. He was granted parole on May 10, 2006.

Mich App 635; 754 NW2d 660 (2008), in which the Court of Appeals held that parole detainees are not entitled to jail credit under MCL 769.11b, the sentencing court denied the motion. The court also ruled that it lacked common law discretion to award credit because MCL 768.7a(2) mandates consecutive sentencing for parolees who commit new felonies while on parole. The Court of Appeals denied defendant's application for leave to appeal for lack of merit. *People v Idziak*, unpublished order of the Court of Appeals, issued July 25, 2008 (Docket No. 285975).

II. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005). We also review constitutional issues de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

III. ANALYSIS

A. INTRODUCTION

The issue of appropriate jail credit arises when a person is convicted of a crime and sentenced to imprisonment, granted parole, and then convicted and sentenced to prison for a new felony committed while on parole. After arrest, the parolee serves time in jail awaiting disposition of the new criminal charges. The issue is whether, after conviction of the new criminal charges, the parolee receives credit against his *new minimum sentence* for the time he served in jail. This is a significant problem because the prisoner's new parole eligibility date is affected. If defendant here is awarded credit against his new minimum sentence for the 98

days he served in jail, he will become eligible for parole 98 days earlier than if he is not granted such credit.

B. THE DEPARTMENT OF CORRECTIONS AND THE PAROLE BOARD

The Department of Corrections (DOC) calculates the new parole eligibility date of a parolee sentenced to a new term of imprisonment for a felony committed while on parole. The Parole Board has no discretion to grant parole until that date. The parties do not take issue with the practices of the DOC or the Parole Board. Understanding their functions is nevertheless critical to understanding the issue presented.

In general, a prisoner becomes subject to the jurisdiction of the Parole Board after he "has served a period of time equal to the minimum sentence imposed by the court . . . ." MCL 791.234(1). A prisoner sentenced to consecutive terms of imprisonment, "whether received at the same time or at any time during the life of the original sentence," is subject to the jurisdiction of the Parole Board "when the prisoner has served the total time of the added minimum terms . . . ." MCL 791.234(3).[2]

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[2] MCL 791.234(1) and MCL 791.234(3) apply to a prisoner "other than a prisoner subject to disciplinary time." Where such a prisoner is concerned, the parole eligibility calculation takes into account any "good time and disciplinary credits" the prisoner has earned. MCL 791.234(2) and MCL 791.234(4) apply to a prisoner "subject to disciplinary time." Although we refer to MCL 791.234(1) and MCL 791.234(3) throughout this opinion, our analysis and decision apply equally to both sets of provisions and both classes of prisoners because the language on which we rely appears in both sets of provisions.

A "prisoner subject to disciplinary time" includes (1) a "prisoner sentenced to an indeterminate term of imprisonment for" a listed offense committed on or after December 15, 1998, or any offense committed on or after that date that is not listed and is punishable by life imprisonment, MCL 800.34(5)(a), and (2) "a prisoner sentenced to an indeterminate

Before June 1, 1988, MCL 768.7a(1)[3] provided for consecutive sentencing for prison escapees and persons

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term of imprisonment" for any crime that is not listed committed on or after December 15, 2000, MCL 800.34(5)(b).

MCL 791.234 provides, in relevant part:

> (1) Except as provided in [MCL 791.234a], a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years other than a prisoner subject to disciplinary time is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.
>
> (2) Except as provided in [MCL 791.234a], a prisoner subject to disciplinary time sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted.
>
> (3) If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.
>
> (4) If a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms. The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

[3] Before the statute was amended in 1988, MCL 768.7a(1) provided:

who committed crimes while in prison. Under that provision and MCL 791.234(3),[4] the DOC had, for more than 40 years, "computed the eligibility for parole of an inmate who commits a crime in prison or an escapee who commits a crime while escaped by adding the consecutive minimum terms of all the offenses for which he is incarcerated in state prison." *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 579-580; 548 NW2d 900 (1996).

In 1988,[5] the Legislature added current MCL 768.7a(2), which provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

> A person who is incarcerated in a penal or reformatory institution in this state, or who escapes from that institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction thereof, be subject to sentence therefor in the manner provided by law for such crimes. The term of sentence imposed for the crime shall commence at the expiration of the term or terms of sentence which the person is serving or has become liable to serve in a penal or reformatory institution in this state.

MCL 768.7a(1), as amended by 1988 PA 48, now provides, in part: "The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state."

[4] 1994 PA 217 renumbered former MCL 791.234(2) as MCL 791.234(3). The *Wayne Co Prosecutor* decision referred to this section as MCL 791.234(2) in order to remain consistent with the parties' briefs. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 573 n 5; 548 NW2d 900 (1996).

[5] 1988 PA 48, effective June 1, 1988.

In *Wayne Co Prosecutor*, we considered the prosecutor's argument that MCL 768.7a(2) impliedly repealed MCL 791.238(5)[6] and MCL 791.234(3) because "the 'remaining portion' clause of [MCL 768.7a(2)] . . . require[d] parolees who commit crimes while on parole to first serve the *maximum* of the earlier sentence before beginning to serve the new sentence." *Id*. at 574. We rejected that argument. Instead, we concluded that MCL 768.7a(2) extended to parolees the same consecutive sentencing treatment to which prisoners who committed crimes while incarcerated and escapees were subjected under former MCL 768.7a(1). *Id*. at 577-578. We saw no indication that the Legislature intended to alter the DOC's longstanding method of sentence calculation, as the prosecutor urged. *Id*. at 580-581. We held that

> the "remaining portion" clause of [MCL 768.7a(2)] requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve. [*Id*. at 584.]

Thus, in *Wayne Co Prosecutor*, we rejected the prosecutor's argument that MCL 768.7a(2) requires a parolee to serve his entire original *maximum* sentence, *plus* his new minimum sentence, before becoming eligible for parole, and held that the DOC's practice of calculating the new parole eligibility date, as mandated by MCL 791.234(3), was consistent with MCL 768.7a(2).

As the parties acknowledge, neither the DOC nor the Parole Board has sentencing authority. The DOC calculates the prisoner's new parole eligibility date after

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[6] MCL 791.238(5) provides: "A prisoner committing a crime while at large on parole and being convicted and sentenced for the crime shall be treated as to the last incurred term as provided under [MCL 791.234]."

sentencing. Under MCL 791.234(3), the Parole Board lacks jurisdiction over the prisoner until he reaches that new parole eligibility date. In general, a parolee will have already served his original minimum sentence,[7] so he will become *parole eligible* after serving his new minimum sentence. At that point, the Parole Board has jurisdiction to decide whether the prisoner is *worthy* of parole. MCL 791.234(3). The issue here is not the practices of the DOC or the Parole Board, but whether the sentencing court is required or authorized, under MCL 769.11b or as a matter of common law discretion, to grant defendant credit against his new minimum sentence for the time he served in jail following his arrest for the new offenses and before his sentencing for those offenses.

C. THE JAIL CREDIT STATUTE

Michigan's sentencing credit statute, MCL 769.11b, provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court

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[7] In general, the parolee will already have served his minimum sentence in order to be eligible for parole, so he will be considered to be serving time against his original maximum sentence. As we explained in *Wayne Co Prosecutor*, however,

> [MCL 791.233(1)(b)] permits "special parole" of a prisoner [other than a prisoner subject to disciplinary time, see MCL 791.233(1)(d)] "whenever the sentencing judge . . . gives written approval of the parole of the prisoner before the expiration of the minimum term of imprisonment."
>
> A special parolee who commits another offense while on parole thus will ordinarily have some time left to serve on the minimum of the earlier sentence before beginning service of the new minimum sentence. [*Wayne Co Prosecutor*, *supra* at 581.]

> in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Although this Court has not considered whether the statute applies to parolees, we considered its applicability in a related context in *People v Prieskorn*, 424 Mich 327; 381 NW2d 646 (1985). There the defendant posted bond for marijuana charges and was arrested while on bond for a driving offense. He was later incarcerated and began serving a 90-day sentence for the driving offense. In the case before this Court, he sought credit toward the sentence for the marijuana conviction for 51 days of the confinement he had served under the sentence for the driving offense. *Id*. at 343. We held that the jail credit statute "neither requires nor permits sentence credit" in cases in which a defendant released on bond after being charged with one offense is subsequently incarcerated as a result of charges arising out of an unrelated offense "and then seeks credit in the former case for that latter period of confinement." *Id*. at 340. "Had the Legislature intended that convicted defendants be given sentence credit for all time served prior to sentencing day, . . . it would not have conditioned and limited entitlement to credit to time served 'for the offense of which [the defendant] is convicted.' " *Id*. at 341. We concluded:

> To be entitled to sentence credit for presentence time served, a defendant must have been incarcerated "for the offense of which he is convicted." Since the fifty-one days of incarceration for which the defendant seeks credit is unrelated to the offense before us for which he has been convicted, he is not entitled to sentence credit for that confinement. [*Id*. at 344.]

In *People v Adkins*, 433 Mich 732, 739; 449 NW2d 400 (1989), we applied *Prieskorn* to a case in which the

defendant was released on bond after being charged with armed robbery and, before trial and conviction of the armed robbery charge, was arrested and convicted of two unrelated stolen property offenses in two other jurisdictions and began serving sentences for those convictions. We held that when, "as here, the defendant has served time not as a result of his inability to post bond for the offense for which he seeks credit, but because of his incarceration for another offense, [MCL 769.11b] is simply not applicable." *Id*. at 751.

Relying on *Prieskorn*, the Court of Appeals recently held that the jail credit statute does not apply to parolees. *Seiders* held that a parolee arrested for a new criminal offense is entitled to jail credit exclusively toward the sentence from which parole was granted and not toward the new sentence. *Seiders*, *supra* at 705-708. The Court cited *Prieskorn*, *supra* at 340-341, for the proposition that MCL 769.11b "does not . . . entitle a defendant to credit for time served before sentencing if he is incarcerated for an offense other than that for which he is ultimately convicted, or for other unrelated reasons." *Seiders*, *supra* at 706-707. It reasoned that because a "defendant is only entitled to a sentencing credit under MCL 769.11b if he has been '*denied or unable to furnish bond*' " and "bond is neither set nor denied when a defendant is held in jail on a parole detainer," MCL 769.11b does not apply to a parole detainee. *Id*. at 707 (emphasis in *Seiders*). The Court of Appeals reaffirmed *Seiders* in *People v Stead*, 270 Mich App 550; 716 NW2d 324 (2006), and *Filip*. *Filip*, following *Seiders*, held that "MCL 769.11b is inapplicable under circumstances where a parolee is held on new charges that constitute a parole violation." *Filip*, *supra* at 641. The Court reasoned:

> MCL 791.238(1) provides that a parolee remains legally in the custody of the Department of Corrections, and that "[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated." This provision unambiguously declares that parole violators cannot avoid confinement pending resolution of the violation proceedings. Such a period of incarceration thus constitutes part of the original sentence and in that sense is credited against it. Moreover, "denied," as used in MCL 769.11b, implies the exercise of discretion, not the recognition of outright ineligibility. For that reason, MCL 769.11b simply does not apply to parole detainees. Therefore, the trial court erred in setting bond for Filip in the first instance. Simply put, the erroneously granted possibility of posting bond did not secure Filip any rights under MCL 769.11b. In sum, contrary to the trial court's ruling, *Seiders* governs and must be applied. [*Id*. at 641-642.]

Although we reach essentially the same conclusion as the Court of Appeals did in *Seiders* and *Filip*—that the jail credit statute does not generally apply to parolees who commit new felonies while on parole—we do so on the basis of a somewhat different analysis. Consistent with our reasoning in *Adkins*, we hold that the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense.[8] He is incarcerated not "because of being denied or unable to

[8] Subject to several exceptions, the general rule under the Michigan Constitution is that all persons are entitled to bail *before* conviction. A parolee is, of course, in the *post*-conviction stage with respect to the earlier conviction from which he was paroled.

furnish bond" for the new offense, but for an independent reason. Therefore, the jail credit statute, MCL 769.11b, does not apply.[9]

Article 1, § 15 of the Michigan Constitution of 1963, which addresses eligibility for bond, provides in relevant part:

> No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, *before* conviction, be bailable by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great:
>
> (a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws of the United States or another state, or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions.
>
> (b) A person who is indicted for, or arraigned on a warrant charging, murder or treason.
>
> (c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.
>
> (d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony. [Emphasis added.]

See also MCR 6.106(B) (pretrial release/custody under Const 1963, art 1, § 15).

[9] Despite Justice MARKMAN's lengthy criticism of *Prieskorn*, *post* at 610-611, it—along with *Adkins*—remains binding precedent. In any event, we base our analysis on the language of MCL 769.11b, which requires jail credit when the defendant serves time in jail "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." A parolee who commits a new crime while on parole serves time in jail *because* he is serving out his earlier maximum term of imprisonment, not "because of being denied or unable to furnish bond for the [new] offense."

Once a prisoner has served his minimum sentence, the Parole Board has jurisdiction over the prisoner and has discretion to grant parole. MCL 791.234(1). While on parole, the prisoner "shall be considered to be serving out the sentence imposed by the court," MCL 791.238(6),[10] but he "remain[s] in the legal custody and under the control of the department," MCL 791.238(1).[11] When there has been a "probable violation of parole," the DOC may issue a warrant for the parolee's return. MCL 791.238(1). Moreover, if "reasonable grounds" exist to believe that the parolee violated

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[10] MCL 791.238(6) provides:

> A parole shall be construed as a permit to the prisoner to leave the prison, and not as a release. While at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court and, if he or she is eligible for good time, shall be entitled to good time the same as if confined in a state correctional facility.

As explained in n 7 of this opinion, a prisoner granted parole will generally have already served his minimum sentence, so he is considered to be serving time against his original maximum sentence.

[11] MCL 791.238 provides, in relevant part:

> (1) Each prisoner on parole shall remain in the legal custody and under the control of the department. The deputy director of the bureau of field services, upon a showing of probable violation of parole, may issue a warrant for the return of any paroled prisoner. Pending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.
>
> (2) A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served. The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution.

his parole, he may be "arrested without a warrant and detained in any jail of this state." MCL 791.239.[12]

Under MCL 791.238(2), a "prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services[13] . . . *is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment*," but the "time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served." (Emphasis added.) Because a paroled prisoner is considered to be serving his sentence as long as he remains in compliance with the terms of his parole, MCL 791.238(6), *except* "from the date of the declared violation to the date of the prisoner's availability for return to an institution," MCL 791.238(2),[14] the second part of MCL 791.238(2) establishes that the time *after* "the date of the prisoner's availability for return to an institution" *is* to be counted as time served against the parolee's original sentence. For a prisoner paroled and arrested again in Michigan, the parolee's "date

[12] MCL 791.239 provides:

> A probation officer, a parole officer, a peace officer of this state, or an employee of the department other than a probation or parole officer who is authorized by the director to arrest parole violators may arrest without a warrant and detain in any jail of this state a paroled prisoner, if the probation officer, parole officer, peace officer, or authorized departmental employee has reasonable grounds to believe that the prisoner has violated parole or a warrant has been issued for his or her return under [MCL 791.238].

[13] Although this provision mentions a warrant issued by the DOC, the prosecutor stated at oral argument that the DOC does not always issue a warrant. As noted earlier, a parolee may be arrested without a warrant and detained if there are "reasonable grounds" to believe that he has violated his parole. MCL 791.239.

[14] This provision is often referred to as the "dead time" statute.

of . . . availability" is effectively the date of his arrest. See *Browning v Michigan Dep't of Corrections*, 385 Mich 179, 188-189; 188 NW2d 552 (1971).[15] The phrase "date of . . . availability" indicates that the parolee resumes serving his earlier term of imprisonment when arrested and detained in jail even though he has not yet been returned to the physical custody of the DOC.

In sum, under MCL 791.238(2), the parolee is "liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment" and actually resumes serving that term of imprisonment on the date of his availability for return to the DOC, which in this case is synonymous with the date of his arrest.[16] The parolee is

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[15] *Browning* held that "the phrase 'date of availability' means actual *or* constructive availability for return to the Michigan penal system." *Browning*, *supra* at 189. *Browning* was decided before consecutive sentencing was mandated for parolees who commit new felonies while on parole. Also, as we noted in *Browning*, before 1968, the "dead time" statute—that is, the statute defining the time that will not be counted as time served for a parolee—used the language "date of arrest" instead of "date of . . . availability." *Id*. at 187. Our decision in *Browning* addressed the disparity created between in-state and out-of-state parolees that resulted from the DOC's interpretation of "date of . . . availability" when an out-of-state detainee was concerned. A 1969 DOC policy directive instructed that, for an alleged parole violator arrested outside of Michigan, "the date of availability will be the date on which the authorities in the holding jurisdiction declare the alleged violator to be available for return to Michigan." See *id*. at 191. We noted that this interpretation effectively imposed consecutive sentencing on an out-of-state parolee and repudiated the DOC's interpretation of "date of . . . availability" in this context. *Id*. at 189. We held that "the phrase 'date of availability' means actual *or* constructive availability for return to the Michigan penal system. The arrest of a parolee, irrespective of the location of the arrest, coupled with issuance of a parole violation warrant and good faith effort to retake the parolee constitutes constructive availability." *Id*.

[16] Under Justice MARKMAN's interpretation of MCL 791.238(2), one does not know whether the time served in jail is to be considered time served against the parolee's original maximum sentence until the parolee is convicted or acquitted of the new criminal charges. At that point, if the parolee is acquitted, "the [Parole] Board must then make a new determi-

not incarcerated "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." MCL 769.11b. Because the parolee is required to remain in jail pending the resolution of the new criminal charge for reasons independent of his eligibility for or ability to furnish bond for the new offense, the jail credit statute does not apply.[17]

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nation regarding how much of the 'unexpired portion' of the defendant's original sentence must be served before the defendant can once again be paroled." *Post* at 611-612. Only "[i]f the Board determines that the defendant does have to serve an unexpired portion" will a defendant who is " 'liable' to serve the 'unexpired portion' " of his original sentence be considered to have served the time in jail against his original maximum sentence. *Post* at 612. As explained in part V of this opinion, Justice MARKMAN's analysis is based on a nonexistent statutory requirement. It is also unnecessary. The meaning of "liable . . . to serve" is found within MCL 791.238(2) itself: the parolee becomes liable, upon arrest, to resume serving his original maximum sentence and actually resumes serving it when he becomes "available"—actually or constructively—to the DOC.

See also the brief of the DOC as amicus curiae in response to defendant-appellant's application for leave to appeal in the case of *People v Wright*, 474 Mich 1138 (2006) (Docket No. 128424), at 5 ("Once the prisoner becomes parole eligible, the focus of the [DOC] is to keep track of the remaining maximum sentence. When the prisoner is granted a parole, each day on parole counts toward the service of the maximum sentence as well. Even if a parole is revoked, the time spent on parole is counted towards the service of the maximum sentence. *The only time the service of a sentence is suspended or stopped is if the prisoner escapes from prison* [see MCL 800.61] *or if as a parolee the prisoner absconds from parole supervision* [see MCL 791.238(2)].") (emphasis added).

[17] We caution that, for a parolee who reached his maximum discharge date while being held in jail, this independent reason would be removed. If the parolee was then "denied or unable to furnish bond," the sentencing court would be required to grant jail credit under MCL 769.11b.

See DOC Policy Directive No. 06.06.100, Parole Violation Process, § B (February 26, 2007) ("If a parolee approaching his or her potential maximum date is believed to have violated a condition of parole, the parole violation process set forth in this policy will be expedited to ensure it is completed prior to that date. Under no circumstances shall a parolee be held on pending parole violation charges beyond his/her maximum discharge date."). The version of the policy directive in effect in 2006 contained an identical provision.

In this case, defendant was paroled on May 10, 2005, from multiple felony convictions. He committed the instant offenses on November 23, 2006, and was arrested on November 28, 2006. He remained in jail until sentencing on March 6, 2007, when he was returned to prison. He now seeks credit for those 98 days against his new minimum sentence. Under MCL 791.238(2), however, defendant resumed serving the remaining portion of his earlier sentences when he was arrested. He was not serving time in jail "because of being denied or unable to post bond" for the new offense, MCL 769.11b, so the jail credit statute does not apply.[18]

D. SENTENCING COURT DISCRETION TO GRANT JAIL CREDIT

We also reject defendant's argument that a sentencing court retains discretion to grant credit[19] regardless of the applicability of the jail credit statute.[20] As explained, the statutory scheme pertaining to parolees dictates that defendant's 98 days in jail were served against his original maximum sentence. The sentencing court had no discretionary authority to circumvent the

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This exception does not apply here because defendant was not nearing his maximum discharge date at the time of his arrest. According to information available on the DOC's Offender Tracking Information System, defendant's maximum discharge date before the new sentences were imposed was 2024 (defendant's current maximum discharge date is listed as 2076, and his combined maximum for the new sentences is 52 years). See <http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=124501> (accessed July 30, 2009).

[18] The court set a $500,000 bond in this case.

[19] Before the Legislature enacted the jail credit statute, a criminal defendant had no right to sentencing credit, and the matter was left to the discretion of the sentencing court. *Prieskorn*, *supra* at 333.

[20] Although there is language to the contrary in *Adkins*, *supra* at 751 n 10, the Court was not considering consecutive sentencing in that case.

operation of the statutory scheme. MCL 769.11b "neither requires nor permits" sentencing credit except as provided in the statute. *Prieskorn*, *supra* at 340. "The enactment of [MCL 769.11b] reflects the Legislature's intention to entitle every defendant in a criminal case to the sentence credit described in the statute, instead of leaving the matter to the discretion of sentencing courts." *Id*. at 333; see also *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006), quoting *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987), citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441 (" 'In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.' "). Accordingly, the sentencing court lacked the authority to grant defendant credit against his new minimum sentence.

E. CONSTITUTIONAL CHALLENGES

Defendant also claims that he was subjected to "multiple punishments" in violation of the double jeopardy clauses of the United States and Michigan constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree. "The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). Defendant claims that because he did not receive credit for the time he spent in jail awaiting sentencing on the

new offenses, he "spent his time in jail awaiting conviction and sentence as a separate, additional term for the latter offense." This is incorrect. As explained, defendant continued to serve out his earlier sentence after he was arrested. He was not subjected to multiple terms of confinement for his new offenses.

Finally, defendant claims that denying credit toward a parolee's new minimum sentence violates due process[21] and equal protection guarantees because it results in unequal treatment of similarly situated defendants.[22] US Const, Am XIV, § 1; Const 1963, art 1, §§ 2 and 17. We reject defendant's contention.

The equal protection clauses of the United States and Michigan Constitutions are coextensive. *Harvey*, *supra* at 6. Unless the legislation at issue creates a classification based on "suspect" factors such as race, national origin, or ethnicity, which trigger the highest level of review ("strict scrutiny"), or factors such as gender or illegitimacy, which require an intermediate level of review ("heightened scrutiny"), it is reviewed under a rational basis standard. *Id*. at 7-8. Defendant acknowledges that rational basis review applies here.

Under rational basis review, " 'the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption.' " *Id*. at 7 (citation omitted). "To prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in

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[21] The substance of defendant's argument focuses on equal protection; he does not separately address the requirements of due process.

[22] In his brief, defendant does not take issue with the DOC's practices, but with sentencing courts' denial of credit: "Disparity is created not by the MDOC parole violation process, but by the judicial practice to date of denying jail credit to parolees who commit new crimes. This practice is anchored by the belief that such offenders do receive credit, they just receive it somewhere else."

a rational way to the objective of the statute." *Id*. (quotation marks and citations omitted). " 'Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice.' " *Id*. (citation omitted).

As is significant to each of defendant's constitutional arguments, parolees are situated differently from non-parolee criminal defendants and, as a result, they do not always enjoy the same "panoply of rights." See *Morrissey v Brewer*, 408 US 471, 480; 92 S Ct 2593; 33 L Ed 2d 484 (1972) ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."). A parolee is only conditionally permitted to leave prison on parole. Parole is "a permit to the prisoner to leave the prison, and not . . . a release," and "[w]hile at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court . . . ." MCL 791.238(6). He "remain[s] in the legal custody and under the control of the department." MCL 791.238(1). As this Court explained in *In re Eddinger*, 236 Mich 668, 670; 211 NW 54 (1926), the

> purpose of a parole is to keep the prisoner in legal custody while permitting him to live beyond the prison enclosure *so that he may have an opportunity to show that he can refrain from committing crime*. It is a conditional release, the condition being that if he makes good he will receive an absolute discharge from the balance of his sentence; but if he does not make good he will be returned to serve his unexpired time. [Emphasis added.]

See also *Jones v Dep't of Corrections*, 468 Mich 646, 651; 664 NW2d 717 (2003) ("A prisoner enjoys no constitu-

tional or inherent right to be conditionally released from a validly imposed sentence.").

Defendant claims that the denial of credit against a parolee's new minimum sentence results in unequal treatment in two ways: first, it creates a disparity between parolees and nonparolees because the latter are granted credit, while the former are not, and, second, it creates a disparity among parolees based on the decision to plead guilty and other "arbitrary" factors that affect the parolee's sentencing date.

The first claimed disparity arises from the application of the jail credit statute, MCL 769.11b. As we have explained, this statute does not apply to parolees upon their arrest for new crimes. Rather, parolees are granted credit against their earlier sentences for time served in jail under MCL 791.238(2). Thus, both parolees and nonparolees receive credit for time served. Defendant may prefer credit on his new sentence, but this is not what the statutes require. And it is entirely rational for the Legislature to treat parolees and nonparolees differently in this regard because parolees are continuing to serve out existing prison sentences after being granted mere conditional releases.

Second, defendant claims that denial of credit results in a disparity among parole violators based on the choice between a guilty plea and a jury trial, as well as other "arbitrary" factors, such as the degree of docket congestion. No statute, including MCL 791.238(2), the jail credit statute, MCL 769.11b, and MCL 791.234(3), which sets forth the method for computing the new parole eligibility date, makes a distinction between a parolee who pleads guilty and one who chooses to go to trial. Even if the Legislature had created such a distinction, the United States Supreme Court has stated that "there is no *per se* rule against encouraging guilty

pleas" and has "squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea." *Corbitt v New Jersey*, 439 US 212, 218-219; 99 S Ct 492; 58 L Ed 2d 466 (1978). Moreover, this Court rejected a similar claim in *Prieskorn*, *supra* at 341-342:

> It may be that for defendants who find themselves incarcerated for multiple unrelated offenses, one of the motivations to plead guilty to some of the charges is the desire to accelerate the imposition of sentence in order to benefit, as much as possible, from Michigan's concurrent sentencing law. But that ingredient of a given defendant's motivation derives from the peculiar facts with which the defendant facing multiple charges is confronted and not, we think, from limiting application of the sentence credit statute to those circumstances described by its terms. We think it is clear that the Legislature sought, by the statute, to give a criminal defendant a right to credit for any presentence time served upon "the offense of which he is convicted." Judicial obedience to the language of the legislation may, incidentally, indeed coincidentally, have the effect of motivating a defendant, who is charged with multiple offenses and who has posted bond for one offense and was released, but who is incarcerated for a second offense, to waive his right to trial and proceed to plead guilty in the first case in order to get the sentencing clock running on that conviction while awaiting final disposition of the offense for which he is denied bond, or final resolution of an unrelated "hold" or "detainer." However, that motivation does not change the language of the statute and should not be judicial excuse for applying the statute to situations to which it does not extend.

To the extent the denial of credit against the new minimum sentence results in some parole violators reaching their parole eligibility dates earlier than others on the basis of "arbitrary" factors such as docket congestion or a judge's illness, this does not amount to a violation of equal protection. Any difference in treat-

ment does not arise from any classification created by the Legislature, and even when *suspect* factors are involved, a disparate impact created by facially neutral legislation does not necessarily amount to a violation of the Equal Protection Clause. See *Washington v Davis*, 426 US 229, 242; 96 S Ct 2040; 48 L Ed 2d 597 (1976). Further, because of parolees' unique status, defendant fails to meet the heavy burden of rebutting the presumption of constitutionality on this issue.[23]

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[23] In his dissenting opinion, Justice MARKMAN asserts that

> the [Parole] Board's current practice of failing to undertake its statutory responsibilities, passively waiting for a defendant to be convicted of a new crime, and then mechanically concluding that the amount of time a defendant has spent awaiting trial on his new offense automatically constitutes the remaining portion of the original sentence that the defendant must serve, treats identically situated defendants in a potentially widely disparate fashion . . . . [*Post* at 627.]

Justice MARKMAN's arbitrariness concern is grounded in his misconception of the statutory responsibilities of the Parole Board. As explained in part V of this opinion, parole eligibility is purely a function of statute. We acknowledge that factors such as docket congestion and a judge's illness affect the date a parolee is sentenced for a new offense, the date he begins serving his new sentence, and, consequently, his new parole eligibility date. But this arises from the operation of the statutory scheme, not from any action—or inaction—of the Parole Board. As Justice MARKMAN acknowledges, *post* at 628 n 11, some arbitrariness will always inhere in the criminal process.

Even Justice MARKMAN's interpretation of the statutory scheme does not remove all arbitrariness. Justice MARKMAN posits that when the parolee is acquitted of the new criminal charges, "the Board must then make a new determination regarding how much of the 'unexpired portion' of the defendant's original sentence must be served before the defendant can once again be paroled. If the Board determines that the defendant does have to serve an unexpired portion of his initial sentence, the defendant will then be awarded credit for time served on his original sentence." *Post* at 611-612 (citations omitted).

To illustrate the arbitrariness that may result, assume Parolee A and Parolee B are each arrested on the same date and charged on the same

F. EXAMPLE CALCULATION

As a simple illustration of how the statutory scheme operates to give credit against a parole violator's original maximum sentence, consider this example. An offender is sentenced to 1 to 10 years in prison. He is granted parole after serving his minimum sentence. No time remains on his minimum sentence, and 9 years remain on his maximum sentence. After 2 years on parole, he commits an act that gives rise to a new felony charge. After a week of "dead time" during which he is not serving time against his prior sentence, he is arrested on the new felony charge and again begins serving the remaining portion of the prior sentence. At that time, he has 7 years remaining on his maximum. He spends 1 year in jail awaiting trial, conviction, and sentencing on the new offense. Accordingly, on his sentencing date, 6 years remain of his original maximum term. He receives a 2- to 5-year term of imprisonment for the new offense.

Under MCL 791.234(3), the DOC calculates the new parole eligibility date by adding the original minimum

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date with new criminal offenses allegedly committed while on parole. Both decide to go to trial and serve time in jail awaiting trial. Parolee A's jury trial is held one month after his arrest, and he is acquitted. Parolee B's trial is delayed for one year because of docket congestion, a judge's illness, or continuances requested by the prosecution for reasons unrelated to Parolee B's case. Parolee B is also acquitted. According to Justice MARKMAN's theory, the Parole Board is in each case required to determine after acquittal whether the parolee is required to serve an "unexpired portion" of his original sentence and, if so, how much. Assume that in the case of each parolee, the Parole Board does so and determines that neither is required to serve any "remaining portion." Thus, under Justice MARKMAN's theory, Parolee A is eligible for parole one month after arrest, while Parolee B is eligible for parole one year after arrest. Even if both receive credit against their original maximum sentences for the time served in jail, Parolee B has suffered parole eligibility consequences for arbitrary reasons.

term and the new minimum term. Because the offender has already served his entire original minimum term, his new parole eligibility date is 2 years from the date of sentencing on the new offense. The DOC calculates the new maximum discharge date by adding the new maximum sentence imposed by the court (5 years) to the offender's original maximum sentence (10 years). Thus, the offender's new maximum term is 15 years. Because he has already served 4 years of his original maximum sentence, the offender's new maximum term will expire 11 years from the date the new sentence was imposed.

IV. RESPONSE TO CHIEF JUSTICE KELLY

Chief Justice KELLY agrees that defendant is not entitled to jail credit under MCL 769.11b, but bases her analysis on an interpretation of MCL 791.234(3)[24] that leads to an illogical result, fails to account for the broader statutory scheme, and is contrary to the long-standing practice of the DOC approved by this Court in *Wayne Co Prosecutor*.

When a prisoner is paroled after serving his original minimum sentence and serves time on parole before committing a subsequent offense while on parole, Chief Justice KELLY's interpretation of MCL 791.234(3) would effectively allow the offender to begin serving his new minimum sentence *before he commits the offense* for which that sentence was imposed. In some cases, this will mean that the offender will, for parole eligibility purposes, have served his entire new minimum sentence before committing the crime. To illustrate, take

[24] As the Chief Justice notes, her analysis applies equally to MCL 791.234(3) and MCL 791.234(4). *Post* at 589 n 2. Our response also applies to both subsections. For consistency, we will continue to refer to MCL 791.234(3).

an offender who commits offense A and is sentenced to a term of 2 to 10 years in prison. After serving his 2-year minimum term, he is paroled. After 7 years on parole (9 years into his maximum sentence), the offender commits offense B and is immediately arrested. He immediately pleads guilty and is sentenced to a term of 2 to 10 years in prison for offense B. Chief Justice KELLY posits that MCL 791.234(3) requires us to simply add all the time the offender has served since the imposition of the sentence for offense A—whether in prison, on parole, or awaiting disposition of the new criminal charges—to determine the offender's new parole eligibility date. Under this approach, the offender here became eligible to be paroled from his sentence for offense B after serving 4 years—*5 years before he committed offense B*. We disagree with Chief Justice KELLY that this is what MCL 791.234(3) requires. MCL 791.234(3) states that for a prisoner "sentenced for consecutive terms," the Parole Board has jurisdiction "when the prisoner has served the total time of the added minimum terms . . . ." The DOC's longstanding practice of calculating a prisoner's new parole eligibility date, reflected in our example calculation above and throughout our analysis, ensures that the parolee serves "the total time of the added minimum terms" while also accounting for the broader statutory scheme applicable to parolees sentenced to consecutive terms of imprisonment.[25]

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[25] Chief Justice KELLY attempts to support her interpretation with an inapt comparison to a first-time offender being awarded jail credit for time served before his sentence is imposed. *Post* at 597. In the case of first-time offenders, the Legislature *explicitly allowed* that result by enacting MCL 769.11b. Nothing in the plain language of MCL 769.11b, however, suggests that credit may be applied to a time before the sentencing offense was even committed. Accordingly, Chief Justice KELLY's example is inapposite.

Moreover, MCL 791.238(6) provides that "[w]hile at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court . . . ." Nothing in MCL 791.238(6) indicates that time a prisoner spends on parole from the original offense may be counted as time served against a new minimum sentence not yet imposed, for a crime not yet committed. On the contrary, "*serving out* the sentence *imposed* by the court" indicates that the paroled prisoner continues to serve the sentence or sentences that exist at the time he is on parole—the sentences he began serving in prison and from which he was paroled. To use the example provided by Chief Justice KELLY, *post* at 598, a defendant may serve time toward his maximum terms for two separate consecutive sentences under the right circumstances. When a defendant is paroled *after* being convicted of a second offense and sentenced to a consecutive term of imprisonment, the defendant is then actually serving out the combined maximum term for the first and second offenses as calculated under MCL 791.234(3). Contrary to Chief Justice KELLY's assertion, however, if the defendant commits a third offense while on parole from the first and second offenses, the court may not apply time served on parole *before committing the third offense* toward the sentence that will be imposed in the future for the third conviction. As noted *earlier*, this contravenes the plain language of MCL 791.238(6).

Similarly, MCL 791.238(2) provides that a prisoner who violates the terms of his parole "is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment." As previously discussed, the prisoner resumes serving that unexpired portion of his original maximum term on the date he becomes available for return to the DOC—in this case, the date of his arrest. MCL 791.238(2) indicates that, after he is ar-

rested and becomes available for return to the DOC, the offender is serving out his original maximum sentence—not his yet-to-be-imposed new minimum sentence. Thus, we disagree with Chief Justice KELLY that "an affirmative and individualized determination [by the Parole Board] is the only proper mechanism for requiring the prisoner to serve additional time only toward his maximum term." *Post* at 594.

Finally, Chief Justice KELLY's interpretation of MCL 791.234(3) is inconsistent with *Wayne Co Prosecutor*. The defendant in that case was originally sentenced to 6 to 15 years in prison. He was paroled after serving about 6 years and 2 months in prison. After nearly 2 years on parole, the defendant committed another offense for which he was sentenced to $3\frac{1}{2}$ to 10 years in prison. Before turning to the effect of newly enacted MCL 768.7a(2), we noted that

> [i]f the foregoing statutory provisions [MCL 791.234(3) and MCL 791.238(5)] were the only provisions applicable, [the defendant] clearly *could be paroled after serving three and a half years* on the breaking and entering conviction. He had already served more than the six-year minimum imposed for the armed robbery conviction before he was returned to prison. [*Wayne Co Prosecutor*, *supra* at 573 (emphasis added).]

We rejected the prosecutor's contention that MCL 768.7a(2) impliedly repealed MCL 791.234(3) and MCL 791.238(5) and held that MCL 768.7a(2) extended to parolees the same consecutive sentencing treatment to which prisoners who commit crimes while incarcerated and escapees were subjected under former MCL 768.7a(1). *Id*. at 577-578. We explained the DOC's longstanding method of calculating the new parole eligibility date as follows:

> For over forty years, the department has computed the eligibility for parole of an inmate who commits a crime in prison or an escapee who commits a crime while escaped by adding the consecutive minimum terms of all the offenses for which he is incarcerated in state prison. Thus, consecutive sentences imposed on persons who, while incarcerated or on escape, commit another crime will commence to run when the total of the *minimum* sentences imposed for prior offenses has been served. Accordingly, *if an inmate or escapee, who has served beyond his minimum term, commits an offense while incarcerated or while on escape, the "consecutive" sentence would commence to run immediately*. [*Id*. at 579-580 (second emphasis added).]

Thus, in *Wayne Co Prosecutor*, we understood MCL 791.234(3), MCL 791.238(5), and MCL 768.7a(2) to mean that if a parolee sentenced to a consecutive term of imprisonment for a crime committed while on parole had already served his original minimum sentence, his new minimum sentence would begin to run *immediately*. We did not suggest that a parolee could begin serving his new minimum sentence *before* committing the crime for which it was imposed.

The DOC's longstanding method of calculating a prisoner's new parole eligibility date yields logical results, complies with MCL 791.234(3), and is consistent with the statutory scheme relevant to parolees sentenced to consecutive terms of imprisonment for crimes committed while on parole. We approved the DOC's practice as consistent with the consecutive sentencing mandate of MCL 768.7a(2) in *Wayne Co Prosecutor*, and neither party here takes issue with the practices of the DOC or the Parole Board. We find it puzzling that Chief Justice KELLY would replace the DOC's practice with an approach that yields illogical results, is inconsistent with *Wayne Co Prosecutor*, and fails to account for the relevant statutory scheme.

V. RESPONSE TO JUSTICE MARKMAN

Justice MARKMAN constructs his analysis around a misconception that the Parole Board is statutorily required to make a "remaining portion" determination after a parolee is convicted or acquitted of a new crime allegedly committed while on parole. He posits that the Parole Board is required to decide how much, if any, of a defendant's unexpired original maximum sentence he would otherwise (absent the second sentence) be required to serve before becoming eligible for parole. But parole eligibility is a function of statute, not Parole Board discretion, and there is no statutory requirement that the Parole Board make the affirmative determination Justice MARKMAN proposes.

Justice MARKMAN's theory proceeds as follows. A prisoner is granted parole once he has served his minimum term of imprisonment. MCL 791.234(1). After his arrest for allegedly committing a new crime while on parole, the offender serves time in jail. Depending on whether the offender is convicted or acquitted, he may be serving that time against his original maximum sentence or his yet-to-be imposed new minimum sentence. Once the offender is convicted or acquitted of the new criminal charge, the Parole Board is required to convene and make an affirmative determination about what, if any, "remaining portion" of his original sentence the offender must serve before becoming eligible for parole (if acquitted) or beginning to serve his new sentence (if convicted). If the offender is acquitted of the new criminal charge, the time served in jail will be credited against his original maximum sentence. If the offender is convicted of the new offense, however, the offender is not considered to have been serving his original maximum sentence while in jail. Instead, he must be granted credit against his new

minimum sentence under MCL 769.11b. That credit must be "*awarded* as a component of the second offense," but it "cannot actually be *applied* until the second sentence is commenced." Accordingly, the new sentence is "suspended until the defendant serves the remaining portion of his original sentence." Once the defendant has served that "remaining portion," he begins serving his new sentence and the jail credit is applied.

Aside from the problem of its astounding complexity, this interpretation is premised on a nonexistent statutory requirement. Recall that a prisoner is generally eligible for parole when he has "served a period of time equal to the minimum sentence imposed by the court . . . ." MCL 791.234(1).[26] Justice MARKMAN asserts that, after conviction or acquittal of the new criminal charges, the Parole Board is required to "make an affirmative determination as to whether the defendant is required to serve any remaining portion on his original sentence . . . ." *Post* at 619. He explains that "when the [Parole] Board determines the remaining portion of a defendant's original sentence, it is essentially undertaking a discretionary decision about when the defendant would have been eligible for parole on his original sentence given the violation he committed while on parole." *Post* at 616. Thus, Justice MARKMAN's analysis is based on the idea that the Parole Board is required to determine how much time a parolee who violates his parole, but is not convicted of a second crime in connection with that parole violation, must serve "in order to be eligible for parole once again on his original sentence . . . ." *Post* at 615-616. He believes that the parol-

[26] Justice MARKMAN acknowledges that "the date of [the defendant's] parole eligibility is determined by MCL 791.234(1) . . . ." *Post* at 604.

ee's parole eligibility date *for the original offense* changes or may change because the parolee has violated his parole.

The flaw in Justice MARKMAN's theory is that *parole eligibility* is a function of statute: MCL 791.234. Unless a new sentence is imposed consecutive to the original sentence, in which case the offender's new parole eligibility date is then governed by MCL 791.234(3), the offender's parole eligibility date does not change. The defendant's parole eligibility remains governed by MCL 791.234(1) and, therefore, the defendant was and is eligible for parole when he has served his original minimum sentence. Absent a new prison sentence that would bring parole eligibility within the ambit of MCL 791.234(3), the offender's parole *eligibility* is unaffected by a finding of a parole violation. To be sure, the Parole Board has the *discretion* to *revoke* parole in that situation,[27] but that does not alter the offender's status as *eligible* for parole. Indeed, the Parole Board is not *required* to revoke parole even if the evidence supports the parole violation allegation by a preponderance of the evidence.[28] We find no statutory support for Justice MARKMAN's underlying conclusion that a parole violation alone may change the parole eligibility date previously calculated under MCL 791.234(1) by making it a matter of the Parole Board's discretion.[29]

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[27] "After a prisoner is released on parole, the prisoner's parole is subject to revocation at the discretion of the parole board for cause as provided in this section." MCL 791.240a(1).

[28] "If a preponderance of the evidence supports the allegation that a parole violation occurred, the parole board *may* revoke parole . . . ." MCL 791.240a(10) (emphasis added).

[29] Justice MARKMAN quotes various sentences from the DOC's amicus curiae brief in support of the proposition that the Parole Board is statutorily required to make a "remaining portion" determination but has "abandoned its responsibility in this respect . . . ." *Post* at 617 n 6.

"An agency such as the DOC has no inherent authority, and the limitations of its power and authority 'must be measured by the statutory enactments from which it is created.' " *People v Holder*, 483 Mich 168, 175 n 21; 767 NW2d 423 (2009) (citation omitted). The Parole Board has the discretionary authority to grant or deny parole, MCL 791.233; MCL 791.234(1), (3), and (4); MCL 791.235. Once it has granted a prisoner parole, the Parole Board also has the authority to "discharge[] [the

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In its amicus curiae brief, the DOC emphasizes that it lacks sentencing authority and that its discretionary authority lies in determinations of parole *worthiness*. When one reads the entire brief, it is clear that the DOC is stating that the Parole Board "does not exercise its discretion" to make a "remaining portion" determination *because it lacks the authority to do so*. In addition, the DOC's amicus curiae brief repeatedly refers the reader to its brief in *People v Wright*, 474 Mich 1138 (2006). There, the DOC explained:

> After a parolee is returned to prison with a new consecutive prison sentence, the Parole Board does nothing, since the prisoner is not yet *parole eligible* as a matter of law until the new minimum sentence is served. It is meaningless for the Parole Board to attempt to make a prediction as to what their parole decision will be one, two, or more years in the future when the prisoner becomes *parole eligible*. However, unlike the situation of a prisoner returned to prison with a new conviction and consecutive sentence, if a prisoner is merely returned to prison as a parole violator for a 'technical violation' such as testing positive for alcohol while on parole release for an OUIL 3rd offense, the prisoner is still *parole eligible*, but the Parole Board has determined that the prisoner is no longer *parole worthy*. The Parole Board does not sentence the parole violator for a 'technical violation' to a new minimum sentence since the Parole Board does not have such power. Rather, the Board sets a new 'continuation date' at which time they will again review the prisoner for *parole worthiness*. The concept of a 'continuation date' is not reserved for parole violators only. If any prisoner is not granted a parole when they first become parole eligible by serving their minimum sentence, the Parole Board sets a new 'continuation date,' typically 12, 18, or 24 months in the future, when the prisoner will again be reviewed for parole *worthiness*. [Brief of the DOC, n 16 *supra* at 14-15 (emphasis in original).]

prisoner] upon satisfactory completion of the parole." MCL 791.234(3). In addition,

> [i]f a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served. [MCL 791.234(5).]

Finally, if the parolee violates the terms of his parole, the Parole Board has the authority to revoke parole. MCL 791.240a. None of these statutorily defined functions of the Parole Board includes a *requirement* that the Parole Board make an "affirmative determination of how long the defendant must serve on [his first] sentence." *Post* at 617.

Instead, Justice MARKMAN locates the "remaining portion" requirement in MCL 791.234(1), as discussed above, MCL 791.241, and MCL 768.7a(2), as interpreted in *Wayne Co Prosecutor*. MCL 791.241 provides, in full: "When the parole board has determined the matter it shall enter an order rescinding such parole, or reinstating the original order of parole or enter such other order as it may see fit." Justice MARKMAN concludes that this constitutes a statutory requirement that the Parole Board make an affirmative "remaining portion" determination because it provides that "the Board 'shall' enter an order taking some action after determining whether a parole violation has occurred . . . ." *Post* at 631 n 14. MCL 791.241 requires the Parole Board to *enter an order* rescinding parole, reinstating parole, or some other order "as it may see fit" once it has been determined whether the parolee violated his parole. Nothing in that provision requires the Parole Board to make a decision about how much additional time, if any, a parolee is required to spend in prison before being

paroled on some predetermined future date. Moreover, when, as here, the parole violation is "conviction for a felony or misdemeanor punishable by imprisonment," the Parole Board does not "determine[] the matter," MCL 791.241, by holding a parole violation hearing because no parole violation hearing is required. MCL 791.240a(3).[30]

Justice MARKMAN locates the "affirmative determination" requirement on which his analysis is based in the following discussion of MCL 768.7a(2) in *Wayne Co Prosecutor*, *supra* at 584: "whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve."[31] As is apparent from the statutes that pertain to the authority of the board (such as MCL 791.234, MCL 791.234, and MCL 791.240a), the Parole Board "requires" the parolee "to serve" by exercising its statutory authority to revoke parole, MCL 791.240a, and therefore delay the possibility of discharge, MCL 791.234(3), and by declining to exercise its discretion under MCL 791.234(5) to terminate the sentence the parolee is presently serving. The Parole Board may account for previous parole violations in making these decisions. See MCL

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[30] Justice MARKMAN also states that MCL 791.233e "provides additional guidance" to the Parole Board in making the "remaining portion" determination.

MCL 791.233e(1) requires the Parole Board to establish parole guidelines to "govern the exercise of the parole board's discretion . . . *as to the release of the prisoners on parole* . . . . The purpose of the parole guidelines shall be to assist the parole board in making *release decisions* that enhance the public safety." (Emphasis added.) There is no reference there, or anywhere else in the statutory scheme, to a "remaining portion" determination.

[31] Chief Justice KELLY shares a similar interpretation. See *post* at 593-594.

791.233e(2)(d). We find no statutory requirement that the Parole Board make an affirmative "remaining portion" determination. Had this Court in *Wayne Co Prosecutor* understood MCL 768.7a(2) to impose a new requirement on the Parole Board, we presumably would have said so.[32]

Thus, in addition to our disagreement with his interpretation of the jail credit statute, MCL 769.11b, we conclude that Justice MARKMAN's approach to jail credit is inconsistent with the statutory scheme pertaining to the authority of the Parole Board and is not required by MCL 768.7a(2) or our decision in *Wayne Co Prosecutor*. Finally, even assuming that Justice MARKMAN is correct that this Court could order the Parole Board to make individualized "remaining portion" determinations without running afoul of *Warda v Flushing City Council*, 472 Mich 326; 696 NW2d 671 (2005),[33] *post* at 618 n 6, we question whether it would be advisable to do so. At the very least, such an order would require a major restructuring of the Parole Board's policies and procedures. In addition, the DOC's current practice of considering a parolee's new sentence to begin running on the date it is imposed for purposes of parole eligibility applies equally to all prisoners. If this Court ordered the

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[32] We also disagree with Justice MARKMAN that a "remaining portion" determination requirement emerges from some combination of MCL 791.234(1), MCL 768.7a(2), and MCL 791.241. We believe the preceding discussion of these statutes makes it clear that there is no such requirement.

[33] Under *Warda*, *supra* at 336-337, if

> a statute empowers a governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency's exercise of that discretion or the judiciary's review of that exercise, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional.

Parole Board to make individualized "remaining portion" determinations, the Parole Board would be free to establish variable standards that would generally be unreviewable by the courts under *Warda*.

VI. CONCLUSION

Under MCL 791.238(2), defendant resumed serving his original maximum sentences when he was arrested in connection with the new criminal offense. Regardless of his eligibility for bond or his ability to furnish it, defendant remained in jail because he was serving those earlier sentences. Accordingly, the jail credit statute, MCL 769.11b, does not apply. The sentencing court lacked authority to grant defendant credit against his new minimum sentence because doing so would be inconsistent with the statutory scheme. Finally, denial of credit against defendant's new minimum sentence did not subject him to multiple punishments for the same offense, and he has failed to show that the denial of credit against his new minimum sentence violated equal protection.

Affirmed.

WEAVER, YOUNG, and HATHAWAY, JJ., concurred with CORRIGAN, J.

KELLY, C.J. (*concurring in part and dissenting in part*). I agree with the majority that a parolee incarcerated on new criminal charges is not entitled to jail credit under MCL 769.11b. If the parolee is convicted, the court may not award credit against the sentence it imposes for time the parolee spent in jail awaiting trial. But I reach that conclusion for different reasons than the majority finds appropriate.

In this case, I believe that the 98 days defendant served in jail should have been considered time served toward the minimum term calculated under MCL 791.234.[1] The existing application of the consecutive sentencing scheme may also be unconstitutional as applied to similarly situated parolees.

THE CONSECUTIVE SENTENCING STATUTES

Persons who are convicted of offenses committed while they are on parole are automatically subject to consecutive sentences under MCL 768.7a(2), which provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

MCL 791.234 specifies how consecutive sentences must be calculated.[2] MCL 791.234(3) states:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms, less the good time and disciplinary credits allowed by statute. The

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[1] MCL 791.234 determines when the Parole Board acquires jurisdiction to parole a prisoner serving consecutive indeterminate sentences.

[2] All analyses of MCL 791.234(3) in this opinion apply with equal force to MCL 791.234(4), which concerns prisoners subject to disciplinary time. The two subsections are identical with respect to when the parole board has jurisdiction and the calculation of a new maximum term. MCL 791.234(3) merely alters the calculation to account for good time or disciplinary credits, which are not available for prisoners subject to disciplinary time under MCL 791.234(4).

> maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served less good time and disciplinary credits, unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

Finally, MCL 791.238(6) states that a parolee is considered to be serving his or her sentence while on parole:

> A parole shall be construed as a permit to the prisoner to leave the prison, and not as a release. While at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court and, if he or she is eligible for good time, shall be entitled to good time the same as if confined in a state correctional facility.

Discerning how to correctly give force to each of these statutes is a difficult task. Unlike the majority, I do not agree that existing practices give proper effect to the statutory language. I believe than the key to the correct interpretation is the timing of the Parole Board's calculation of a consecutive sentence under MCL 791.234(3).

APPLICATION OF THE SENTENCING STATUTES

MCL 768.7a(2) provides for consecutive sentences for all paroled offenders who are convicted of and sentenced for a new felony committed while they were on parole for their original offense. Once the parolee is sentenced for the new offense, the Parole Board calculates the date when he or she will again be eligible for parole pursuant to MCL 791.234(3).

Under MCL 791.234(3), a prisoner must serve "the total time of the added minimum terms" before becoming eligible for parole. The parolee's new parole eligibility date is computed by considering first how much time

the parolee must serve, then determining how much time the parolee "has served."

MCL 791.234(3) therefore defines when the Parole Board has jurisdiction to parole a prisoner serving consecutive indeterminate sentences. It does so by combining the terms of the old and new sentences into one aggregate term. The minimum and maximum terms of the old and new sentences are added together. The result is a single term with one minimum and one maximum. The new minimum and maximum set the new boundaries of the time a prisoner must serve.

It is only when this aggregate, single term has been determined that the Parole Board can calculate the parolee's new parole eligibility date.[3] Thus, calculating what constitutes "time served" is inevitably a retroactive exercise. The Parole Board does not determine a defendant's new parole eligibility date until after he or she is sentenced for the new offense.

Under the current practice of the Department of Corrections (DOC), the minimum sentence of a paroled defendant who offends again does not begin until the date of sentencing. Consequently, the Parole Board does not acquire jurisdiction over that defendant until he or she has served the equivalent of the minimum term of that new offense. That term is measured from the date of sentencing on the new offense.

However, this practice does not reflect what the statute requires. The statute mandates only that the prisoner serve an amount of time equal to the added minimum terms of incarceration. That time served includes (1) time served in prison on the original

[3] This conclusion is based on common sense. Until the minimum terms of a parolee's consecutive sentences are combined, the Parole Board cannot know how much minimum time the parolee must serve before again becoming eligible for parole.

offense, (2) time served on parole for the original offense, according to MCL 791.238(6), and (3) time spent in jail awaiting disposition of the new charges.

The parties do not dispute that the Parole Board lacks authority to alter a defendant's sentence. It cannot add time to the minimum sentence already served.[4] As we have noted:

> [C]onsecutive sentences imposed on persons who, while incarcerated or on escape, commit another crime will commence to run when the total of the *minimum* sentences imposed for prior offenses has been served.[5]

In *Wayne Co Prosecutor*, we also observed that the "Legislature's intent in enacting [MCL 768.7a(2)] was simply to extend the statutory provisions of [MCL 768.7a(1)] to parolees . . . ."[6] The Parole Board has not only the authority but a statutory obligation to use the terms of sentences imposed by courts in order to calculate both (1) the earliest point at which a prisoner may be released on parole and (2) the point at which he or she must be discharged from prison.

I conclude that the plain meaning of "total time" in the clause "when the prisoner has served the total time of the added minimum terms" must apply to all time served. Generally, no remaining portion remains on a defendant's minimum term when he or she is paroled. Therefore, any time served on parole or in jail awaiting disposition of new charges should be counted as time served toward the aggregate minimum sentence. *Wayne Co Prosecutor* erred to the extent it went beyond that

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[4] Normally, a defendant's minimum sentence has run when he or she is paroled.

[5] *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 580; 548 NW2d 900 (1996) (emphasis in original).

[6] *Id*. at 581.

language and concluded that the consecutive sentence would commence immediately upon the parolee's new offense. That conclusion does not take into account the timing of the Parole Board's calculation of a defendant's added minimum terms under MCL 791.234(3).

My interpretation is consistent with this Court's interpretation of MCL 768.7a(2) and truer to its holding in *Wayne Co Prosecutor*. In that case, we also held that

> the "remaining portion" clause of [MCL 768.7a(2)] requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve.[7]

We therefore rejected the prosecutor's argument that MCL 768.7a(2) requires a prisoner to serve his or her entire original maximum sentence before beginning to serve his or her new minimum sentence. Under MCL 791.234(3), the Parole Board lacks jurisdiction over the prisoner for the purposes of parole until he or she reaches the new parole eligibility date. However, after the prisoner is sentenced for the new offense, the Parole Board clearly has the authority to require the prisoner to serve an additional portion of the original maximum sentence. This is due to his or her parole violation. As indicated by the use of the permissive language from *Wayne Co Prosecutor*, "may . . . require him to serve," the Parole Board need not add time.

In current practice, however, the Parole Board does not make such a decision. It passively treats time served in prison before sentencing for a new offense, however long that may be, as time served for the defendant's

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[7] *Id*. at 584.

parole violation.[8] But this time served is currently counted only toward the defendant's original maximum sentence.[9] I believe that this policy does not constitute a discretionary decision. Therefore, I believe *Warda v Flushing City Council*[10] is not applicable.

I believe that the Parole Board may exercise its discretion to decide whether a prisoner eligible for parole will serve additional time in prison because of a parole violation. However, I also believe that such an affirmative and individualized determination is the only proper mechanism for requiring the prisoner to serve additional time only toward his maximum term. The DOC's current practice also raises troubling questions about the constitutionality of its treatment of similarly situated individuals.[11]

CRITICISMS OF MY APPROACH

I disagree with the majority and Justice MARKMAN that my interpretation contravenes consecutive sen-

[8] The DOC's policy states that "[a] parolee convicted of a felony while on parole who receives a new sentence to be served with the Department shall be found to have violated parole based on that new conviction and sentence. A parole revocation hearing is not required." MDOC Policy Directive 06.06.100, § T, effective February 26, 2007. The policy does not address the issue of how much additional time must be served in prison for the parole violation.

[9] This policy directly contravenes MCL 791.234(3) as well as the statement from *Wayne Co Prosecutor* that consecutive sentences begin running when the total of the minimum sentences imposed for prior offenses has been served. See my previous discussion of *Wayne Co Prosecutor*.

[10] *Warda v Flushing City Council*, 472 Mich 326; 696 NW2d 671 (2005). There, the majority held that discretionary decisions made by legislative and executive agencies are unreviewable by the courts. However, the *Warda* majority also noted that "[w]here decision-making falls outside the scope of such discretion, such decision-making would be fully subject to judicial review." *Id.* at 333 n 3.

[11] See the constitutional arguments section later in this opinion.

tencing. When someone has been convicted of multiple offenses and received a consecutive sentence, time he or she serves is not credited to the minimum sentences for more than one conviction. In contrast, under a concurrent sentence, any time served is applied to all prisoners' minimum sentences.

Under my interpretation of MCL 769.11b, consistent with a consecutive sentence, a prisoner's time served would never be applied toward more than one minimum sentence. Time served would not be applied toward the second minimum sentence until the first minimum sentence had been served. Time served might be applied against the *minimum* term of a new sentence and the *maximum* term of the old sentence at the same time. But, under Michigan's indeterminate sentencing scheme, minimums and maximums are often served concurrently, even when consecutive sentencing applies.[12] Indeed, the current application of MCL 791.234(3) applies time served by reoffending parolees to satisfy the minimum sentence of the new offense and the maximum sentence of the old offense simultaneously. This occurs because the maximum sentence for the old offense has not been served when the convict is resentenced. The time left is incorporated into the offender's new combined maximum sentence.

Moreover, I disagree with the majority opinion that my interpretation is undermined by MCL 791.238(6). As discussed previously, the Parole Board has no authority to alter a defendant's sentence. A defendant's early release date is not calculated until after the minimum and maximum terms of both consecutive

[12] In *Wayne Co Prosecutor*, this Court rejected the argument that Michigan's consecutive sentencing scheme requires offenders to serve the entire maximum sentence of their original offense before beginning a new minimum sentence. *Wayne Co Prosecutor*, *supra* at 579-584.

sentences have been added together. I believe that all the time that a defendant has served should be applied toward that aggregate term, as calculated by the Parole Board pursuant to MCL 791.234(3). I reject the majority's contention that the Legislature intended that time spent on parole should count only toward the sentence imposed by the court before the prisoner was paroled.[13]

The majority's conclusions are premised on an erroneous assumption: A prisoner serving an existing prison term while awaiting trial for a new offense cannot be considered to be serving time toward a new sentence that is imposed after the trial. The error in this assumption is illustrated by examining the application of jail credit to the sentences of first-time offenders. While a first-time offender is in jail awaiting trial, he is not serving his sentence. He has not yet been convicted, and there is no sentence to serve. But once convicted, he is considered to have been serving the sentence while in jail awaiting trial.

Similarly, while a parolee is incarcerated awaiting trial for new criminal conduct, he or she cannot be serving his or her new sentence because it does not yet exist; he or she is only serving his or her prior sentence. But once the second sentence has been imposed, MCL 791.234(3) becomes operative. Only at that point can the new aggregate term governing the prisoner's incarceration be computed. The minimum terms of both sentences are added together, as are the maximum terms of both sentences.

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[13] The majority's observation that the word "imposed" is written in the past tense does not undercut my conclusion. The timing of the Parole Board's determinations is the focal point. Because time served is calculated *after* a prisoner's minimum terms are added together, the prisoner's time spent on parole is time served on the sentence "imposed"—past tense—by the court.

At that point, it is relevant to ask, with respect to parole eligibility and maximum discharge dates, how much time the prisoner has served. MCL 791.238(6) indicates that the parolee is considered to have been serving his sentences while on parole. That none of the sentences existed at the time he was deemed to be serving them is not inherently problematic.[14] The same result occurs with the award of jail credit to a first-time offender. While in jail, a first-time offender is similarly considered to have been serving a sentence that did not yet exist.

The "sentence imposed by the court" referenced in MCL 791.238(6) should not be given the overly restrictive meaning that the majority ascribes to it.[15] This is made clear by MCL 8.3b, which provides that in construing statutes,

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[14] While vigorously and repeatedly protesting that "the plain language of MCL 791.238(6)" does not allow such a result, the majority provides scant support for why this is so. Indeed, its sole basis for this conclusion is that my interpretation would contravene consecutive sentencing. As explained earlier in this opinion, I disagree that my approach contravenes consecutive sentencing.

[15] The majority advances one additional reason why my opinion is contrary to the plain language of MCL 791.238(6). Apparently, the majority would require that a statute affirmatively state that a prisoner may be credited for time served before the sentencing offense was committed. Otherwise, that result cannot be a feasible interpretation. *Ante* at 577-578 & n 25. I reject the notion that absent statutory language stating "a prisoner may be credited for time served before the sentencing offense was committed," one cannot discern such an interpretation. As noted, an analysis of the applicable statutes in context with one another supports such an interpretation. Moreover, MCL 791.238(6) specifically does provide, without limitation, that prisoners on parole are "serving out the sentence imposed by the court . . . ."

The majority's limitation on MCL 791.238(6) never gives effect to the timing of the Parole Board's calculation of time served. Nor does the majority squarely address that when read together, MCL 791.234 and MCL 791.238(6) require that all time served count as time served toward a prisoner's added minimum terms.

> [e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number.

Thus, even though MCL 791.238(6) refers to a single sentence, it may properly be considered to reference multiple sentences, including those being served consecutively.

Furthermore, MCL 791.238(6) credits all parolees for time served while on parole, whether they are serving two sentences imposed consecutively, or three or more. Another example illustrates how this occurs. A prisoner is paroled from a single sentence and receives a consecutive sentence for a new felony committed while on parole. The prisoner is paroled again and commits a third felony resulting in a third consecutive sentence. In what sense was the prisoner serving out the "sentence imposed by the court"? Quite literally, the prisoner was not actually serving a single sentence imposed by a court. Rather, the prisoner was serving a combined term of imprisonment computed by the DOC under MCL 791.234(3) after the prisoner's second offense. This combined term is an aggregate term with added minimums and added maximums. That combined term included two sentences imposed by the court as its component parts. Thus, it is not a failure of logic to read MCL 791.238(6) to mean that, while on parole, parolees are serving sentences imposed by the court. They are serving all of them, including the one imposed for the most recent episode of new criminal conduct committed while on parole.

I also disagree with the assertion in the majority's and Justice MARKMAN's opinions that my interpretation leads to "illogical" or "anomalous" results.[16] Most of

[16] *Ante* at 576, 580; *post* at 622 n 9.

this criticism is that my interpretation could result in a repeat offender being deemed eligible for parole immediately upon being sentenced for a new offense. Clearly, such a situation could occur. But, of course, the Parole Board always has the discretion not to grant parole. Therefore, the situation does not constitute the absurd result of a repeat offender likely being paroled without serving time for a second offense. Certainly, it does not warrant disregarding the statutory language.

I offer this hypothetical example by way of illustration of what MCL 791.234(3) requires: An offender is sentenced to 1 to 10 years in prison. The offender is granted parole after serving the minimum sentence. No time remains on the minimum sentence, and 9 years remain on the maximum sentence. After 2 years on parole, the offender commits an act that gives rise to a new felony charge. The offender is immediately arrested and jailed. At that time, the offender has 7 years remaining to serve on the maximum sentence.

The offender then spends 1 year in jail awaiting trial, conviction, and sentencing on the new offense. Accordingly, on the sentencing date, 6 years remain to be served on the original maximum term.

The offender receives a 7- to 15-year term of imprisonment for the new offense. Under MCL 791.234(3), the DOC calculates the new parole-eligibility date by adding the new minimum term (7 years) and the minimum term of his original sentence (1 year). His new minimum term is 8 years. The DOC calculates the new maximum discharge date by adding the new maximum sentence (15 years) to the original maximum sentence (10 years). Thus, the offender's new maximum sentence is 25 years.[17]

[17] All the parties agree that it is the court that sets the terms of the respective judgments of sentence that the DOC uses to determine the new minimum and maximum terms.

The key question is how much time has the offender served toward this newly calculated 8- to 25-year term by the time the DOC calculates it? I conclude that under a plain reading of MCL 791.234(3), the offender has served 4 years of that sentence: 1 in prison on the original offense, 2 on parole, and 1 while incarcerated awaiting trial for the new offense. Therefore, in the hypothetical example, the offender is eligible for parole 4 years after sentencing for the new offense.

THE JAIL CREDIT STATUTE

MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

I agree with the majority that this statute does not apply to parolees who offended again and spend time in jail awaiting disposition of the new charges against them. But my rationale is different. Because the time served in jail counts as "time served" on the aggregate minimum term calculated by the DOC, a parolee is not entitled to other credit for such time. If the parolee were to receive credit against the court's sentence for the offense committed while on parole, the parolee would receive double credit for the same time. This Court has consistently rejected this outcome in other contexts.[18]

CONSTITUTIONAL ARGUMENTS

Members of this Court, including myself, have previously observed that the practices at issue appear to

[18] See, e.g., *People v Patterson*, 392 Mich 83; 219 NW2d 31 (1974).

arbitrarily treat similarly situated parolees differently, presenting potential violations of those individuals' constitutional rights.[19] As the majority correctly observes, defendant here does not specifically challenge the practices of the DOC but argues that the judicial practice of denying jail credit to parolees is unconstitutional. Because I conclude that MCL 791.234(3) requires time served in jail under these circumstances to count toward a defendant's new minimum sentence, I need not reach defendant's constitutional arguments.

Because a majority of the Court rejects my reading of the statutes, however, I am compelled in dissenting to remark on the possible constitutional violation presented by the current scheme. The current treatment of parolees' time served is, in my view, so irrational and arbitrary as to risk failing constitutional muster. Parolees who commit identical crimes and who receive identical sentences may serve vastly different sentences solely on the basis of the date of sentencing. The date sentencing occurs is influenced by factors outside the parolee's control, including docket congestion, a judge's illness or vacation time, or the prosecutor's speed in pursuing the case. The current system allows these factors to determine how much time served is credited against a convict's sentences, and it results in disparate treatment.

Equally troubling are circumstances where there is a disparity in sentencing dates because a parolee exercises his or her constitutional right to a trial on his or her second offense. The majority is correct that " 'there is no *per se* rule against encouraging guilty pleas' . . . ."[20] However, I submit that the current practice of applying

[19] *People v Wright*, 474 Mich 1138 (2006) (MARKMAN, J., dissenting); *People v Conway*, 474 Mich 1140 (2006) (KELLY, J., dissenting).

[20] *Ante* at 572-573, quoting *Corbitt v New Jersey*, 439 US 212, 218-219; 99 S Ct 492; 58 L Ed 2d 466 (1978).

time served may be unconstitutional because the disparate treatment and resulting promotion of guilty pleas is " 'needless.' "[21]

Finally, I take note that courts have expressed objections to the present practice for almost 20 years,[22] yet neither the Legislature nor the DOC has addressed it. I would not allow their failure to grasp the nettle to prevent us from finally doing so today.

CONCLUSION

I agree with the majority that MCL 769.11b does not apply to parolees held in prison on new criminal charges. However, I reach this conclusion because time served in jail awaiting disposition of new charges should be considered time served toward a defendant's aggregate minimum term under MCL 791.234(3). Finally, I am concerned that the existing application of the statutory scheme to prisoners who offend again while on parole is unconstitutional.

Therefore, I would direct the Parole Board to recalculate defendant's parole eligibility date using the analysis herein.

CAVANAGH, J., concurred with KELLY, C.J.

MARKMAN, J. (*dissenting*). I respectfully disagree with the majority's conclusion that MCL 769.11b, the "jail

[21] *Corbitt*, *supra* at 219 n 9.

[22] See, e.g., *People v Watts*, 186 Mich App 686, 691 n 4; 464 NW2d 715 (1991) ("[T]his inequitable situation could be resolved in a number of ways . . . . For that matter, a strict reading of MCL 791.234(2); MSA 28.2304(2) could be applied, the two minimum terms added together, and the parole date calculated accordingly. . . . [W]hile we urge the Legislature to address this issue, we decline to do so ourselves."). Justice WEAVER was on the Court of Appeals panel that decided *Watts*.

credit" statute, is inapplicable to a defendant who spends time in jail awaiting sentencing for a new crime committed while he is on parole. In accordance with MCL 769.11b, "any person" is entitled to jail credit when he is "denied or *unable* to furnish bond for the offense of which he is convicted . . . ." (Emphasis added.) Because a defendant who commits a new crime while on parole is unquestionably "unable" to furnish bond for the new offense for which he is convicted, he is entitled to jail credit. Contrary to the majority's view, it is of no consequence whether a defendant was unable to furnish bond "because of" a parole detainer, as defendant here was, as long as he was unable to post bond "for the offense of which he was convicted . . . ." Thus, defendant should have received 98 days of jail credit toward the sentence for his new offense for the time he spent incarcerated while awaiting sentencing on his new offense. However, the majority not only disallows the award of jail credit under MCL 769.11b, but it does so without fully addressing the very significant problem of arbitrariness that arises under its interpretation. That is, the majority's interpretation leads to a situation in which identically situated defendants may be treated in a widely disparate fashion on the basis of entirely serendipitous factors, such as an assistant prosecutor's diligence or a judge's vacation schedule. Because I believe the majority has erred in its interpretation of the relevant statutes, I dissent.

I. ANALYSIS

The ultimate issue in this case is whether, under MCL 769.11b, defendant is entitled to jail credit for the time he was incarcerated awaiting sentencing for a crime he committed while on parole. Because a proper resolution of this issue involves the interrelation of

several different statutes, I will begin this analysis by providing an overview of how the parole process operates and will then discuss how the relevant statutes relate to one another by applying these provisions to a hypothetical defendant.

A. PAROLEES AND TIME SERVED

As a general matter, when a defendant is convicted of a felony, he is sentenced to an indeterminate term of imprisonment and is incarcerated, thereby being placed in the custody of the Michigan Department of Corrections (DOC). He then begins serving his sentence, and the date of his parole eligibility is determined by MCL 791.234(1), which provides:

> Except as provided in [MCL 791.234a], a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years other than a prisoner subject to disciplinary time is subject to the jurisdiction of the parole board when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable.

Thus, once the defendant serves an amount of time "equal to the minimum sentence," he is eligible for parole and may be paroled by the Parole Board (the Board). Assuming the Board grants the defendant parole, he then becomes a parolee and, according to MCL 791.238(6), continues to serve out the unexpired portion of his sentence while on parole. MCL 791.238(6) provides: "A parole shall be construed as a permit to the prisoner to leave the prison, and not as a release. While at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court."

To illustrate how these statutes operate together, assume a defendant has been convicted of a crime and is sentenced to a term of 5 to 10 years' imprisonment. After serving the minimum 5-year term, the defendant becomes eligible for parole, and the Board decides to grant the defendant parole, thereby making him a parolee. The parolee spends 1 year on parole and then commits a new crime, which means that he has now served a total of 6 years on his original 5- to 10-year sentence. However, once he is incarcerated for allegedly committing a new offense, the "unexpired portion" of the initial sentence, along with how the parolee's time spent in jail pending a determination of whether he violated his parole is allocated, is determined, in part, by MCL 791.238, which states:

> (1) Each prisoner on parole shall remain in the legal custody and under the control of the department. . . . Pending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.
>
> (2) A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.

Notably, subsection 2 only states that a parolee, after being reincarcerated, is "liable" to serve out the "unexpired portion" of his first offense, not that he automatically resumes serving that term. Being "liable" to serve out the unexpired portion of the original sentence is not, as assumed by the majority, the equivalent of automatically continuing to serve that sentence, as a

parolee does while he remains on parole.[1] See MCL 791.238(6). This conclusion is supported by the distinctive language of MCL 791.238(6) and MCL 791.238(2), each of which establishes, in a different context, when a defendant is and is not considered to be serving out his original sentence.

In MCL 791.238(6), the Legislature specifically requires that a prisoner "shall" be considered serving out the unexpired portion of his initial sentence while on parole. MCL 791.238(2), on the other hand, only states that a parolee is "liable" to serve out the "unexpired portion" of his first sentence, but does not require that he automatically resume serving that unexpired portion. MCL 791.238(2) also clarifies, using mandatory language ("shall not"), when a parolee is *not* to receive credit toward his original sentence. If the Legislature

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[1] The majority concludes that a defendant who is arrested for committing a new crime while on parole automatically continues serving his original sentence using the following analysis:

> Because a paroled prisoner is considered to be serving his sentence as long as he remains in compliance with the terms of his parole, MCL 791.238(6), *except* "from the date of the declared violation to the date of the prisoner's availability for return to an institution," MCL 791.238(2), the second part of MCL 791.238(2) establishes that the time *after* "the date of the prisoner's availability for return to an institution" *is* to be counted as time served against the parolee's original sentence. [*Ante* at 565.]

Although the majority's assumption that a prisoner resumes serving time on his original sentence as soon as he becomes available for return to the institution is not unreasonable when MCL 791.238(2) is read independently of other relevant statutes, the majority's interpretation of MCL 791.238(2), in conjunction with the jail credit statute and other relevant statutory provisions, strongly suggests that this analysis is incorrect. More specifically, as will be discussed in part I(C) *infra*, a defendant who violates parole by committing a new crime cannot serve his new sentence concurrently with his original sentence. See MCL 768.7a(2). Thus, when a prisoner receives jail credit toward the sentence for his new offense, he *cannot* also be serving time toward the sentence for his original offense.

had intended that a parolee who is arrested for a new crime while on parole automatically continues serving time toward the sentence for his first offense, it could have used the same definite language ("shall") as it did in MCL 791.238(6). However, because MCL 791.238(2) instead uses permissive language ("is liable . . . to serve"), rather than the same mandatory language used in MCL 791.238(6), it becomes necessary to examine whether a defendant is actually serving time toward his original sentence when he is arrested for a new crime while on parole. The answer to this question depends on whether the defendant's parole violation ultimately leads to a subsequent conviction of another crime for which jail credit can apply.

If a defendant is arrested because of a parole violation that does not constitute a new criminal offense, and the Board requires the defendant to serve an additional amount of the unexpired portion of his first sentence, then there is no question that any time the parolee spends reincarcerated must be credited as time served toward his original sentence because there is no other sentence to which that time can be credited. However, if a defendant is arrested for a new crime while on parole, MCL 768.7a(2), as discussed in part I(C) *infra*, prohibits the defendant from serving his original and new sentence concurrently, which means that the only way to know if the defendant is serving time toward his original sentence is to determine if the parolee will receive jail credit for his new sentence once he is convicted. If he does receive jail credit, then despite the fact that he remains liable to serve out the unexpired portion of his initial sentence, he will not have actually been doing so during the time he was reincarcerated. Thus, in order to determine whether a defendant who is arrested for committing a new crime will be entitled to credit for time served on his original

sentence for which he remains liable, it becomes necessary to determine whether a defendant in this situation receives jail credit toward his new sentence.

B. JAIL CREDIT

The jail credit statute, MCL 769.11b, states:

> Whenever any person is hereafter convicted of any crime within the state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, . . . [the court] shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

MCL 769.11b applies to "any person," not just nonparolees who spend time in jail awaiting trial. Additionally, the jail credit statute applies to a variety of situations by requiring that "any" defendant "shall" be awarded jail credit when he is incarcerated awaiting sentencing "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." The statute is silent with respect to the reason that a defendant is being held, and only requires that he spend time in jail "*because of* being denied or unable to post bond *for* the offense of which he is convicted," which means that a defendant is entitled to jail credit on his new sentence as long as he cannot post bond for the new offense, regardless of the reason. However, the majority, by relying on this Court's decision in *People v Prieskorn*, 424 Mich 327; 381 NW2d 646 (1986), which interpreted the jail credit statute in a similar context, construes MCL 769.11b as requiring that a defendant be denied or unable to post bond *because of* the offense for which he is convicted in order to be eligible for jail credit.[2] *Prieskorn* held:

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[2] The majority states:

We believe the sentence credit statute neither requires nor permits sentence credit in cases, such as the one before us, where a defendant is released on bond following entry of charges arising from one offense and, pending disposition of those charges, is subsequently incarcerated as a result of charges arising out of an unrelated offense or circumstance and then seeks credit in the former case for that later period of confinement.

* * *

We agree that the primary purpose of the sentence credit statute is to "equalize as far as possible the status of the indigent and less financially well-circumstanced accused with the status of the accused who can afford to furnish bail."

* * *

Had the Legislature intended that convicted defendants be given sentence credit for all time served prior to sentencing day, regardless of the purpose for which the presentence confinement was served, it would not have conditioned and limited entitlement to credit to time served

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> [W]e hold that the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not "because of being denied or unable to furnish bond" for the new offense, *but for an independent reason*. [*Ante* at 562-563 (emphasis added).]

Again, however, the statute says nothing about the "reason" that a defendant is unable to post bond or has his bond denied; rather, it applies as long as he is actually denied or unable to furnish bond. It is simply irrelevant under MCL 769.11b that a defendant is unable to post bond because of a parole detainer.

> "for the offense of which [the defendant] is convicted." [*Id*. at 340-341 (citation omitted).]

In other words, the majority agrees with *Prieskorn*'s reasoning, which subtly alters the statute by requiring that a defendant must be denied or unable to post bond for a reason attributable to the new offense. *Prieskorn*'s analysis is flawed for two reasons. First, *Prieskorn*'s initial premise, i.e., that the jail credit statute was intended to equalize the existing disparate treatment between indigent and non-indigent defendants, is incorrect. MCL 769.11b simply states that "any person" who is "denied or unable to furnish bond for the offense of which he is convicted" is entitled to jail credit on the sentence for the new offense. The statute does not state that its purpose is to remedy differing treatment of indigent and non-indigent defendants. Indeed, the requirement of MCL 769.11b that any person be awarded jail credit if the person is "*denied* or unable to furnish bond" conclusively rebuts *Prieskorn*'s suggested purpose. That is, although a defendant may be unable to furnish bond because of indigency, he is never denied bond for that reason. Thus, the majority's resolution of whether MCL 769.11b applies to defendant in this case cannot rely on *Prieskorn*'s stated purpose.

Second, *Prieskorn* quoted the jail credit statute out of context by stating that the Legislature "conditioned and limited entitlement to credit to time served 'for the offense of which [the defendant] is convicted.' " *Id*. at 341. A full reading of MCL 769.11b reveals that no such condition or limitation exists. MCL 769.11b merely requires that jail credit be awarded if a defendant is "unable to furnish bond *for* the offense of which he is convicted . . . ." Requiring that a defendant be unable to post bond "for" an offense is significantly different from stating that a defendant can only receive credit based

on "time served *for* the offense." In essence, both *Prieskorn* and the majority rewrite the phrase "denied or unable to furnish bond for the offense of which he is convicted" to say "unable or denied bond *because of* the offense for which he was convicted." This is not an interpretation consistent with the actual statute, and I therefore reject it.

MCL 769.11b only requires that, if a defendant is incarcerated awaiting trial and is "denied or unable to furnish bond for the offense of which he is convicted," then he "shall" be awarded jail credit. The statute does not place an additional qualification or restriction on a defendant's right to receive jail credit by stating that the denial or inability to furnish bond must be because of the new crime. As a result, in a situation in which a defendant is arrested for a new crime while on parole, the defendant will be "unable to furnish bond for the offense of which he is convicted" *because of* a parole detainer that is placed on him by the DOC.[3] Further, if a defendant requests bond, it will be "denied" by the trial court for the same reason, in which case he will then be "unable" to post bond due to the denial. Thus, when a defendant is arrested for a new crime while on parole, *and is ultimately convicted*, as was defendant in this case, he is entitled to jail credit.

If, however, a parolee is not actually convicted of the newly charged offense, then he obviously cannot be awarded jail credit because there is no new "offense of which he is convicted." In that situation, the Board must then make a new determination regarding

[3] A parole detainer is levied on defendants who are arrested while on parole. The detainer prevents a defendant from being released from confinement until the Board makes its determination of how much time he must serve on the "unexpired portion" of his original offense. See MCL 791.238(1) and (2).

how much of the "unexpired portion" of the defendant's original sentence must be served before the defendant can once again be paroled. See MCL 791.233; MCL 791.233e; MCL 791.234(11); MCL 791.238(2). If the Board determines that the defendant does have to serve an unexpired portion of his initial sentence, the defendant will then be awarded credit for time served on his original sentence. It is only in this scenario in which a defendant who is "liable" to serve the "unexpired portion" of his initial sentence under MCL 791.238(2) that the defendant must receive credit for time served toward his original sentence. Once the defendant serves that additional portion of his original sentence, he can be paroled again and, upon successful completion, have his sentence discharged. MCL 791.234(3) and (4).

Returning to the scenario in which the defendant has committed a new crime while on parole, assume that the defendant spends exactly 1 year in jail between the time of his arrest and sentencing. During that time, the defendant is unable to post bond because of a parole detainer. Similarly, if the defendant does request bond, it will be denied by the trial court for the same reason. After being convicted of the new crime, the defendant is sentenced to a new 5- to 10-year term of imprisonment. The question then becomes whether the 1-year period that the defendant spent in jail is credited toward the original or new sentence. Recall that MCL 791.238(2) renders the reincarcerated defendant "liable" to serve out the "unexpired portion" of his original sentence. Additionally, the Board does not make its determination of how much, if any, additional time the defendant must serve on his original sentence until he is convicted or acquitted of the new crime.[4] Thus, the

[4] When a defendant violates his parole by engaging in conduct other than committing a new criminal offense, the Board is required to

determination whether to allocate the time a defendant spent in jail as time served on his original sentence or as

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hold a series of hearings under MCL 791.239a ("probable cause" hearing) and MCL 791.240a ("parole revocation" hearing). However, when a defendant violates his parole by committing a felony or misdemeanor punishable by imprisonment, MCL 791.240a implicitly allows a formal trial, or acceptance of a plea agreement, to serve as a substitute. MCL 791.240a(3) states:

> Within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility under accusation of a parole violation *other than conviction for a felony or misdemeanor punishable by imprisonment under the laws of this state*, the United States, or any other state or territory of the United States, the prisoner is entitled to a fact-finding hearing on the charges before 1 member of the parole board or an attorney hearings officer designated by the chairperson of the parole board. [Emphasis added.]

In light of this provision, the DOC enacted guidelines. The most recent version provides, in pertinent part:

> M. A parolee who is charged with violating a condition of parole is entitled to a preliminary parole revocation hearing conducted pursuant to Administrative Rule 791.7740 through 791.7750 to determine if there is probable cause to believe that s/he violated parole except under the following circumstances:
>
> 1. The parolee has been bound over to the Circuit Court on a criminal charge for which s/he also is charged with parole violation. In such cases, probable cause for that parole violation charge is established based on the court's action. . . .
>
> 2. The parolee has been convicted of a criminal charge for which s/he also is charged with parole violation. This includes a conviction by trial or by guilty or nolo contendre [sic] (i.e., no contest) plea. In such cases, probable cause for that parole violation charge is established based on the conviction.
>
> * * *
>
> T. A parolee convicted of a felony while on parole who receives a new sentence to be served with the Department shall be found to have violated parole based on that new conviction and sentence. A parole violation hearing is not required. [DOC Policy Directive No. 06.06.100, Parole Violation Process (February 26, 2007) (emphasis in original).]

jail credit toward his new sentence can only be made at the time of sentencing for the new crime, or shortly before, because the trial court may only award jail credit at sentencing and not at any time thereafter. Here, the hypothetical defendant was sentenced to a new term of imprisonment on the basis of his new criminal offense and was unable to furnish bond for this new offense while he was awaiting trial. Therefore, the jail credit statute applies, and the defendant is awarded 1 year of jail credit toward his new offense. However, awarding jail credit creates a tension between MCL 769.11b and the consecutive sentencing statute, MCL 768.7a(2), which requires that a defendant serve the "remaining portion" of his original sentence *before* beginning his new sentence, as described below.

C. CONSECUTIVE SENTENCING AND PAROLE ELIGIBILITY

After awarding jail credit to a defendant who was incarcerated for committing a new offense while on parole, it becomes necessary to examine MCL 768.7a(2), which establishes a consecutive sentencing requirement as follows:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

Thus, because the Board does not determine whether parole will be revoked until a defendant has been convicted, or has accepted a plea agreement, for a new crime, the Board necessarily does not compute how much time the defendant will be required to serve on his unexpired original sentence until that time as well.

The pivotal component of this provision is that a defendant's "term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense." At first glance, awarding jail credit for a defendant's second sentence before he has completed the remaining portion of his first sentence appears inconsistent with the consecutive sentencing scheme established by MCL 768.7a(2). Yet, upon a closer evaluation of how the "remaining portion" phrase in MCL 768.7a(2) relates to MCL 769.11b, this potential conflict is alleviated.

In *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996), this Court interpreted MCL 768.7a(2) and stated:

> We conclude that the "remaining portion" clause of [MCL 768.7a(2)] requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve.

As an initial matter, it is important to distinguish the phrase "unexpired portion," as used in MCL 791.238(2), from "remaining portion," as used in MCL 768.7a(2). The unexpired portion of a sentence is the time that remains on a defendant's entire indeterminate sentence and that can be discharged after the defendant successfully completes parole.[5] The remaining portion of a

[5] It should also be noted that the "remaining portion" of the original sentence is distinct from the concept of "discharge," see MCL 791.234(3) and (4), and the concept of "termination," see MCL 791.234(5). A "discharge" is only secured after a parolee successfully completes his parole. MCL 791.242; MCL 791.234(3) and (4). In the case of a defendant who has a single sentence, he can be paroled, successfully complete that parole, and then be discharged. In the case of a defendant who was on

defendant's original sentence, on the other hand, represents the time that a defendant who violates his parole would otherwise have to serve in order to be eligible for parole once again on his original sentence if he had not been sentenced for a new consecutive sentence, which is why *Wayne Co Prosecutor* described the "remaining portion" as the period of time that the Board "may, because the parolee violated the terms of parole, require him to serve." Thus, when the Board determines the remaining portion of a defendant's original sentence, it is essentially undertaking a discretionary decision about when the defendant would have been eligible for parole on his original sentence given the violation he committed while on parole. In other words, MCL 768.7a(2) establishes a sensible requirement that a defendant who violates his parole should first have to serve out whatever "remaining portion" he would have to serve on the "unexpired portion" of his original sentence before the new minimum term on the second offense can begin to run. Such a requirement ensures that a defendant will serve at

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parole for an initial offense and violated his parole by committing a new crime, the defendant will be required to serve the remaining portion of his sentence, be paroled, successfully complete parole, and then be discharged.

The Board's power to "terminate" a sentence is established by MCL 791.234(5) and is applicable as follows:

> If a prisoner other than a prisoner subject to disciplinary time has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served.

Thus, serving the remaining portion of the original sentence does not relieve the defendant of his liability to serve the entire maximum term of that sentence because the original sentence is neither discharged nor terminated.

least all the minimum time for each individual consecutive sentence that was imposed.

Therefore, before a defendant who is unsuccessful in completing his parole because he committed a subsequent crime can begin serving his second sentence, he must first serve out the remaining portion of his first sentence, which, as noted by *Wayne Co Prosecutor*, must be established by the Board's affirmative determination of how long the defendant must serve on that sentence.[6]

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[6] That the Board is, according to both *Wayne Co Prosecutor* and MCL 768.7a(2), required to make a discretionary determination concerning the remaining portion of the defendant's original sentence is of particular significance in this case. In order for it to render this determination, MCL 791.233e(1) requires that the DOC establish guidelines "that shall govern the exercise of the parole board's discretion . . . as to the release of prisoners on parole under this act," which the DOC here has done. MCL 791.233e(2) then provides additional guidance by describing the types of factors that are relevant to making parole decisions, e.g., the "offense for which the prisoner is incarcerated," the "prisoner's institutional conduct," "the prisoner's prior criminal record," and so forth. These factors must be evaluated by the Board in determining whether the defendant must serve any remaining portion on his initial sentence.

However, in practice, the Board seems to have abandoned its responsibility in this respect by allowing the remaining portion to be established solely by how long it takes the defendant to proceed to trial, or accept a plea agreement, on the new offense. Indeed, in its amicus curiae brief, the DOC repeatedly acknowledged that it does not exercise any discretion in this regard by stating that "as a matter of policy, the Department does not impose any additional sanction on a defendant who violates a parole and is given a new prison sentence"; "the Department does not exercise its discretion and tack on another period of time on top of the new established minimum date before an inmate becomes parole eligible"; and "as a matter of policy, the Department merely recalculates the sentence under the statutes for the defendant by adding the remaining portions of the minimum (if any) and the maximum from the original sentence with the minimum and maximum of the new conviction." Thus, the Board currently does not, as required by the statute, the DOC guidelines, and *Wayne Co Prosecutor*, make any affirmative determination using the relevant considerations regarding what amount of time a

Wayne Co Prosecutor, 451 Mich at 582 (observing that the Board must make such a determination, given the Court's "conclusion that the Legislature did not intend [MCL 768.7a(2)] to repeal all discretion held by the Parole Board"). Further, because, the defendant cannot begin serving his second sentence until he has completed the remaining portion of his original sentence, awarding jail credit in addition to allocating the time served to the original sentence would allow for double-counting of the time served, which would result in a concurrent sentence, in violation of MCL 768.7a(2). Thus, a defendant who violates his parole by committing a new crime can only receive credit toward one sentence, and because the jail credit statute requires that credit be given toward the new sentence, a defendant cannot also have the time served allocated to his original sentence in this situation.

Of particular importance to this analysis, and because jail credit must be *awarded* as a component of the second offense, which cannot begin to run until the remaining portion of the first sentence is completed, the

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defendant must serve on the remaining portion of his first sentence. It is this failure that is currently causing identically situated defendants to be treated differently on the basis of entirely arbitrary factors, as discussed in part II. That is, identically situated defendants are being required to serve widely disparate remaining portions of their original sentences on the basis of the serendipitousness of how long it takes them to proceed to sentencing, regardless of whether that time has any relation to the severity of the original offense or the new crime that constitutes the parole violation.

Because the Board concedes that it is not undertaking any decision in this regard, this Court should, at a minimum, order that it do so. By issuing such an order, this Court would not run afoul of our holding in *Warda v Flushing City Council*, 472 Mich 326, 333 n 3; 696 NW2d 671 (2005), which "precludes the judiciary from reviewing the discretionary decision-making of legislative and executive agencies." (Emphasis deleted.) Issuing an order of this sort would simply require the Board to *undertake* the very type of discretionary decision the law requires.

awarded jail credit cannot actually be *applied* until the second sentence is commenced. By not immediately applying such credit, the new sentence will be suspended until the defendant serves the remaining portion of his original sentence. Once the time remaining on that sentence has been completed, the new sentence begins and the previously awarded jail credit is then applied. Thus, by requiring the defendant to serve the entire remaining portion of his original offense before jail credit is applied to his new sentence, the consecutive sentencing regime in MCL 768.7a(2) is given full effect.

Continuing with the earlier hypothetical example, recall that the defendant has served 6 years of his original sentence and, while on parole, is subsequently arrested for committing a new crime. Assume that the defendant now spends exactly 1 year in jail before being sentenced to another term of 5 to 10 years for his new offense. Pursuant to MCL 769.11b, that 1 year is awarded as jail credit once the defendant has been sentenced for the new offense and will ultimately be applied toward the second sentence, which leaves the total amount of time already served on his first sentence at 6 years. After the conviction, the Board is then required to make an affirmative determination as to whether the defendant is required to serve any remaining portion on his original sentence, which I will presume for purposes of this example is an additional 2 years. Therefore, the defendant must now serve another 2 years on his first sentence *after he has been sentenced* for the new offense, and none of the time spent between arrest and sentencing will be credited toward his original sentence. After the defendant serves the additional 2 years on his original sentence, he will have served a total of 8 years on the first sentence (5 years in prison + 1 year on parole + 2 years in prison after his new conviction). It is at this point that the

defendant will be considered to have served the remaining portion of his original sentence and can begin serving his new sentence. Upon beginning his new sentence, the defendant's jail credit is applied. Thus, once the second sentence begins, the defendant will be considered to have served 1 year toward the new 5- to 10-year sentence.

At this point, it becomes necessary to determine the defendant's new parole-eligibility date. For calculating such a date when there is a newly imposed consecutive sentence, MCL 791.234(3)[7] provides:

> If a prisoner other than a prisoner subject to disciplinary time is sentenced for consecutive terms, whether received at the same time or at any time during the life of the original sentence, the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms . . . .[8]

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[7] Although I refer to MCL 791.234(3) throughout this opinion, this analysis is equally applicable to MCL 791.234(4), which is nearly identical to MCL 791.234(3). The only distinction between these two provisions is that MCL 791.234(4) applies to prisoners who are "subject to disciplinary time," whereas MCL 791.234(3) does not. For purposes of resolving the issue currently before this Court, this distinction is not relevant.

[8] To avoid any confusion, it must be noted that although "the parole board has jurisdiction over the prisoner for purposes of parole when the prisoner has served the total time of the added minimum terms," MCL 791.234(3), this does not alter the Board's responsibility to make a determination of the remaining portion of the defendant's sentence under MCL 768.7a(2) after conviction of the new offense. This is so because, although the "remaining portion" decision *does* affect the date for which the defendant is eligible for parole, it *does not* affect the decision regarding whether he is actually paroled once he becomes eligible. Put differently, the Board only has jurisdiction to parole a defendant after his total minimum terms have been served, but the Board retains jurisdiction over the defendant for purposes of determining factors that affect his parole eligibility. Further, if the Board could not make any decisions that affected the defendant's parole-eligibility date, then it could not make any determinations regarding a defendant's "good

> The maximum terms of the sentences shall be added to compute the new maximum term under this subsection, and discharge shall be issued only after the total of the maximum sentences has been served . . . unless the prisoner is paroled and discharged upon satisfactory completion of the parole.

As is clear, a defendant who is subject to consecutive terms is now liable for a "new maximum term," which is simply calculated by adding the old and new maximums. However, the language used to describe the amount of time that a defendant must spend on his minimum terms is notably different from that used to determine the new maximum term. More specifically, MCL 791.234(3) provides that the defendant must serve

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time" in prison that would make the parolee eligible for early release in those cases in which a defendant is eligible to receive credit for "good time." See, generally, MCL 791.234.

Moreover, MCL 791.234(1) specifically states that

> a prisoner sentenced to an indeterminate sentence and confined in a state correctional facility with a minimum in terms of years . . . *is subject to the jurisdiction of the parole board* when the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted . . . . [Emphasis added.]

This language is distinct from that used in MCL 791.234(3), stating that the Board "has jurisdiction over the prisoner *for purposes of* parole . . . ." (Emphasis added.) Thus, MCL 791.234(1) allows the Board to obtain jurisdiction over the defendant for purposes of his original sentence after he has served his minimum term for that offense. It does not purport to divest the Board of that jurisdiction once the defendant has been convicted of a new crime for which MCL 791.234(3) then applies. Once MCL 791.234(3) applies, the Board is only prohibited from exercising jurisdiction in order to actually parole the defendant until he has served the combined minimum terms of the original and new sentences. In sum, although the Board cannot parole a defendant who is serving consecutive sentences until he has served the total time of the added minimum terms, the Board does retain jurisdiction over the defendant for the original offense, which allows it to make the "remaining portion" determination required by MCL 768.7a(2).

the "total" time of the "added minimum terms," not that a new minimum term is created. This difference is important because, when the statute is read in conjunction with the consecutive sentencing statute, MCL 768.7a(2), the defendant is not required to serve a new minimum term, but has to serve the total time of the combined minimum terms. Significantly, the minimum term for the new offense cannot be served until the new sentence begins to run,[9] which means jail credit toward the second sentence's minimum term will only be applied after (a) the Board makes its determination about the remaining portion of the first sentence; and (b) the defendant serves the remaining portion of his first sentence.[10] Once the defendant serves this "remaining portion," and then serves an amount of time equal to the minimum term on the second sentence, which includes any jail credit, the defendant will

[9] It is this consideration that leads me to reject the thoughtful interpretation of MCL 769.11b, MCL 768.7a(2), and MCL 791.234(3) offered by the Chief Justice because, under her interpretation, a defendant would be allowed to count his time served on the first offense toward satisfying the time he must serve on his second offense. In that case, a defendant would actually be serving his original and new sentences concurrently rather than consecutively; by doing this, the Chief Justice's interpretation renders the requirement of MCL 768.7a(2) that "the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense" effectively nugatory. Additionally, this interpretation would allow defendants in some instances to become eligible for parole immediately upon being convicted of a new offense, which leads to what I view as an illogical and anomalous result.

[10] As stated earlier, a defendant who serves the remaining portion of his original sentence has not been discharged, MCL 791.234(3) and (4), nor has that sentence been terminated. MCL 791.234(5). Indeed, if the term "remaining portion" found in MCL 768.7a(2) were interpreted in this manner, it would render nugatory MCL 791.234(3), which requires the new and old maximums and minimums to be added together, because there would be no old maximum and minimum terms to use in this calculation.

have served the total time of the added minimums. At that point, he becomes eligible for parole.

In the hypothetical, the defendant's new "maximum term" is 20 years (10 years for the original maximum + 10 years for the new maximum). The total time of his "added minimum" terms is 10 years (5 years for the original minimum + 5 years for the new minimum). The defendant has now served a total time of 9 years on his new maximum (5 years on his original minimum + 1 year on parole + 2 years of the remaining portion of his original sentence + 1 year of jail credit toward his new sentence) and a total of 6 years toward the total of his added minimum terms (5 years on his first minimum term + 1 year jail credit). Thus, the defendant would be eligible for parole 4 years from the date that his new sentence begins to run (10 years total minimums – 6 years served on the total minimums).

D. APPLICATION

In this case, defendant was on parole for a previous offense when he committed two new crimes, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a new term of 12 to 50 years' imprisonment for the armed robbery conviction and received a mandatory determinate 2-year sentence for the conviction of possession of a firearm during the commission of a felony. Defendant spent 98 days in jail between the date of his arrest and the date of sentencing and was not awarded jail credit.

Applying the analysis described earlier, defendant should have been awarded 98 days of jail credit because he was "denied or *unable* to furnish bond for the offense of which he [was] convicted." MCL 769.11b (emphasis added). The Board was then required to make an

affirmative determination of how much time he was required to serve on the remaining portion of his first sentence. Instead of doing so, the Board automatically, and indeed arbitrarily, determined that the remaining portion was the 98 days that defendant spent incarcerated. Because, in my view, defendant was entitled to jail credit, I would order the Board to render a determination of the remaining portion of defendant's original sentence. In order to correct the errors involved in this matter, the time defendant has already served on his new sentence in excess of the 98 days of jail credit must be first allocated as time served on the remaining portion of his original sentence rather than his new sentence. Any time left over will then count toward defendant's new sentence. If there is still time to be served on the remaining portion of his original sentence, however, the sentence for the new offense should be suspended until defendant has completed the remaining portion of his original sentence.

II. ARBITRARINESS

In contrast to the interpretation of the relevant statutes set forth in this opinion, the majority concludes that the jail credit statute, MCL 769.11b, has no application to defendants who are incarcerated because of a parole violation. As a result, under the majority's interpretation, identically situated parolees are, and will continue to be, treated differently for entirely serendipitous reasons. Specifically, the majority refuses to correct the Board's practice of arbitrarily determining how much time a parolee who commits a new crime must serve on the remaining portion of his original sentence. See part I(C) n 6 of this opinion. Indeed, the majority only tangentially discusses this problem by characterizing defendant's argument as follows:

> Defendant claims that the denial of credit against a parolee's new minimum sentence results in unequal treatment [because] . . . it creates a disparity among parolees based on the decision to plead guilty and other "arbitrary" factors that affect the parolee's sentencing date.
>
> * * *
>
> . . . Even if the Legislature had created such a distinction, the United States Supreme Court has stated that "there is no *per se* rule against encouraging guilty pleas" and has "squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea." *Corbitt v New Jersey*, 439 US 212, 218-219; 99 S Ct 492; 58 L Ed 2d 466 (1978). . . .
>
> To the extent the denial of credit against the new minimum sentence results in some parole violators reaching their parole eligibility dates earlier than others on the basis of "arbitrary" factors such as docket congestion or a judge's illness, this does not amount to a violation of equal protection. [*Ante* at 572-573.]

This analysis is misleading, and the majority thereby mischaracterizes the nature of the arbitrariness problem. That is, the majority views the issue presented in this case as whether a defendant who commits a new crime while on parole can be "encouraged" to enter a guilty plea instead of prolonging the judicial process by insisting on his right to a trial. While the majority is correct that *Corbitt* does not prohibit the state from compelling a defendant to chose between accepting a plea agreement offering a potentially shorter sentence in exchange for giving up his right to go to trial, the majority altogether ignores the actual arbitrariness problem present here, which has almost nothing to do with whether a defendant accepts or rejects a plea agreement. To illustrate the true arbitrariness problem, consider two examples.

In the first example, consider two identically situated defendants who both proceeded to trial after being arrested for a new offense while on parole. Assume that these defendants both received 5- to 10-year sentences for their original offenses. After 5 years, both the defendants are paroled, and both commit the same new crime exactly 1 year after being conditionally released from prison and opt to proceed to trial. Defendant A is convicted of the new crime and exactly 30 days after his reincarceration is sentenced to an additional 5 to 10 years for the new crime. Defendant B is also convicted and sentenced to an additional 5 to 10 year term for the new crime. However, Defendant B is not sentenced until 1 year after he was arrested and incarcerated because: (1) the prosecutor requested multiple continuances for reasons unrelated to the defendant's case; (2) the trial judge took ill; or (3) a police officer whose testimony was needed was on vacation, which required the trial court to grant a continuance. Under the majority's interpretation of the jail credit statute, Defendant A would be eligible for parole 11 months earlier than Defendant B for no reason having anything to do with the relevant statutes.

In the second example, consider two identically situated defendants who both accepted plea bargains. Assume that defendants A and B committed the same crime and were both sentenced to 5- to 10-year terms of imprisonment for their original offenses. They are both paroled after serving 5 years, and both commit the same new crime exactly 1 year after being paroled. The defendants are then offered the same plea bargain, which both agree to take. Defendant A is able to plead guilty in 1 month and be sentenced to a new 5- to 10-year term, while Defendant B, for one of the reasons set forth in the previous paragraph, is not sentenced for

6 months. Defendant A will be eligible for parole 5 months earlier than Defendant B on the basis, again, of entirely arbitrary factors.

As can be seen by comparing two defendants who accept plea agreements and two who do not, the majority's claim that there is "no per se rule against encouraging guilty pleas" is an inapt characterization of the arbitrariness problem at issue here, which is that identically situated defendants are treated in an arbitrary fashion, regardless of whether they proceed to trial or not. More specifically, the Board's current practice of failing to undertake its statutory responsibilities, passively waiting for a defendant to be convicted of a new crime, and then mechanically concluding that the amount of time a defendant has spent awaiting trial on his new offense automatically constitutes the remaining portion of the original sentence that the defendant must serve, treats identically situated defendants in a potentially widely disparate fashion, regardless of whether they accept a plea deal or not. This treatment is based on wholly arbitrary factors that have nothing to do with a defendant's culpability or with the severity of his original or new crime. Rather, the remaining portion of the sentence that a defendant must spend incarcerated before trial, which prolongs his parole-eligibility date after the new sentence is imposed, becomes a function solely of "the fortuity of how long it takes the criminal justice system to proceed to a defendant's final sentencing . . . ." *People v Wright*, 474 Mich 1138, 1140 (2006) (MARKMAN, J., dissenting).

Significantly, the majority devotes little analysis or discussion to the serendipity of the process by which the state deprives an individual of his liberty and refuses to compel the Board to satisfy its obligations under

MCL 768.7a(2) and *Wayne Co Prosecutor* to render an affirmative determination of what "remaining portion" must be served on an original sentence before the beginning of a new sentence. In summary fashion, the majority concludes that "it is entirely rational for the Legislature to treat parolees and nonparolees differently . . . ." *Ante* at 572. However, given that it is not the disparate treatment of parolees as compared to nonparolees that gives rise to the underlying arbitrariness problem, I question whether the majority has adequately addressed the relevant issues in this case.[11]

III. RESPONSE TO THE MAJORITY

In response to this opinion, the majority makes three specific arguments that warrant further discussion. First, it argues that the Board has no authority to alter a prisoner's parole eligibility date by stating that "[t]he flaw in [the instant opinion's] theory is that

[11] The majority correctly notes that the theory set forth in this case will not resolve all arbitrariness problems. It asserts this based upon a hypothetical scenario wherein identically situated parolees violate their parole and are both incarcerated awaiting trial without being allowed to post bond. *Ante* at 574 n 23. Both parolees are acquitted, and the Board determines that neither is required to serve a remaining portion of their original sentences. Both parolees are then placed back on parole. In the majority's hypothetical, Parolee A is able to proceed to trial in one month, while Parolee B, based on arbitrary factors, is unable to proceed to trial until one year after being arrested for the alleged parole violation. The result is that Parolee B spends 11 more months in jail than Parolee A. However, this situation is no different than when two non-parolee defendants are charged with crimes, denied bond, and ultimately acquitted, with one defendant spending one month in jail awaiting trial and the other defendant spending one year in jail awaiting trial. Although these situations undeniably contain an element of arbitrariness, there is no obvious or practical remedy. The distinction between these situations and the arbitrary treatment directed toward parolees in the instant case is that parolees *do* have a remedy, which is to be awarded jail credit toward their new offenses when they are ultimately convicted.

parole eligibility is a function of statute: MCL 791.234. Unless a new sentence is imposed consecutive to the original sentence, in which case the offender's new parole eligibility date is then governed by MCL 791.234(3), the offender's parole eligibility date does not change." *Ante* at 583 (emphasis in original). Further, the majority states that the Board's only "discretionary authority lies in determinations of parole *worthiness*." *Ante* at 584 n 29 (emphasis in original). I respectfully disagree.

In fact, the Board *does* possess the authority to determine a prisoner's parole-eligibility date. While the majority is correct that MCL 791.234 establishes the *initial* parole eligibility date for a prisoner, there are various instances in which that date, as a practical matter, must be recalculated. For example, when a parolee violates his parole and is reincarcerated for that violation, the Board must determine whether the prisoner will be given another opportunity for parole and, if such an opportunity will be afforded, on what date the Board will consider whether the prisoner is in fact deserving of parole.[12] Once that new date for parole

[12] If the majority is correct that the Board can never set a parole-eligibility date that is different from the date established by MCL 791.234, then once a parolee's parole has been revoked for a parole violation, he could never be re-paroled. That is, if a defendant who was serving a 5- to 30-year sentence was paroled on year 5, violated parole on year 6, and had his parole revoked, the Board would not then be able to re-parole him because it would be powerless to set a new parole-eligibility date. However, despite the majority's statement to the contrary, it acknowledges implicitly that the Board has such authority when it states that "[t]he Parole Board may account for previous parole *violations* in making" decisions as to whether a prisoner's current sentence should be terminated or a parolee's sentence discharged. *Ante* at 586 (emphasis added). A parolee could not have previous parole "violations" unless the Board had determined that he had committed a violation and subsequently set a new parole-eligibility date on which the prisoner was again paroled and positioned to violate parole a second time. The majority

consideration has been reached, the Board must then look to the factors in MCL 791.233e and the DOC guidelines, see note 4, *supra*, to determine whether the prisoner is "parole worthy." That is, when the Board sets a new possible parole date, it is setting a new "parole eligibility" date. It is only when the prisoner reaches that new "parole eligibility" date that his "parole worthiness" is actually considered.[13]

Second, the majority argues that the Board has no duty to make an affirmative determination as to how long a defendant must serve on his original sentence by inquiring as to the statutory authority that requires the Board to make the "remaining portion" determination. The statutory authority consists in sum of: (a) MCL 768.7a(2), which states that when a parolee violates his parole and is sentenced to a new term of imprisonment that is to run consecutive to his original offense "the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment for the previous offense"; (b) MCL 791.234(1), which vests the Board with jurisdiction over the prisoner when he "has

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thereby appears to concede that the Board possesses the authority to set a new parole-eligibility date even after a parolee has violated parole.

[13] Additionally, my disagreement with the majority's distinction between parole eligibility and parole worthiness is that, for purposes of the present analysis, it is entirely academic. Even if the majority is correct that the Board's authority to revoke parole and establish a subsequent date at which that defendant will be re-evaluated and that this date constitutes the new parole-worthiness date, the Board's responsibility to make a determination as to the remaining portion of a defendant's original sentence pursuant to MCL 768.7a(2) remains the same. That is, once a parolee violates parole, the Board possesses the authority, under the *majority's* view, to determine at what future date it will reconsider his parole worthiness. Regardless of whether that future date is termed the "parole-eligibility date" or the "parole-worthiness date," the time period between the parole violation and that future date is the remaining portion described in MCL 768.7a(2).

served a period of time equal to the minimum sentence imposed by the court" for the original offense; and (c) MCL 791.241, which states that, after determining whether a parole violation occurred, the Board "shall enter an order rescinding such parole, or reinstating the original order of parole or enter such other order as it may see fit." Thus, the Board necessarily has jurisdiction over a prisoner who is paroled, and, once it is determined that the parolee has violated his parole, the Board "shall" enter an order reflecting what action it is taking, including whether the parole violator must serve a "remaining portion" on his original offense.[14]

Despite these statutory provisions, the majority claims that "[n]one of these statutorily defined functions of the Parole Board includes a *requirement* that the Parole Board make an 'affirmative determination of how long the defendant must serve on [his first] sentence.' " *Ante* at 585 (emphasis in original). While the majority is correct that no individual statute *alone* requires the Board to make an affirmative determination concerning the "remaining portion" that a parole violator must serve, this Court does not interpret

[14] Because the Board "shall" enter an order taking some action after determining whether a parole violation has occurred, the majority is incorrect in asserting that there is "no statutory requirement that the Parole Board make an affirmative 'remaining portion' determination." *Ante* at 587. Additionally, *Wayne Co Prosecutor*, 451 Mich at 584, has already determined that the Board must make a remaining portion determination, which consists of "whatever portion, between the minimum and the maximum of the earlier sentence that the Parole Board may, because the parolee violated the terms of his parole, require him to serve." Thus, if the Board intends to impose *any* remaining portion, it must affirmatively do so. Otherwise, there is no remaining portion for which the defendant can be required to serve. Thus, even if the majority is correct that the Board has no duty to make an affirmative determination as to the remaining portion, the result of not making that determination is that there is no remaining portion that the defendant must serve before his new sentence begins to run.

in isolation clauses or paragraphs or subsections or even statutes, which together comprise part of a larger statutory scheme. Rather, each of the three principal statutes discussed herein must be read in context with the other statutes in order to ascertain the meaning of the "remaining portion" used in MCL 768.7a(2), and to determine which entity must make the "remaining portion" determination. When the pertinent laws are interpreted together, as they must be, it becomes as reasonably clear as it can be in this very difficult and convoluted area that the Board is obligated to make decisions concerning a parolee's "remaining portion," so that the parolee does not begin to receive credit toward his new sentence until he has served an appropriate amount of additional time on his original sentence as a result of a parole violation. The majority's resistance to reading the relevant statutes *in pari materia* leads to what I view as an unreasonable interpretation of MCL 769.11b in which: (a) equally situated defendants may be treated in a widely disparate manner based upon entirely arbitrary factors; and (b) parolees who commit parole violations may escape the full consequences of their actions if the Board is precluded from imposing a proportional "remaining portion." The Legislature has not mandated these results, and I therefore disagree with the majority's unharmonious reading of the law.

IV. CONCLUSION

MCL 769.11b requires that "any person" "shall" be awarded jail credit "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." Contrary to the majority's interpretation, there is no limitation or qualification present in this statute requiring that a defendant be denied or unable

to furnish bond for any reason related to the new offense itself. Rather, the defendant need only be denied or unable to furnish bond for the new offense. Defendant here was unquestionably "unable" to furnish bond for the offense of which he was convicted and, thus, is entitled to 98 days of jail credit toward the sentence for his new offense for the amount of time he spent incarcerated awaiting sentencing. The Parole Board, in my view, must also undertake an affirmative determination of the "remaining portion" of defendant's original sentence that he must serve before beginning his new sentence. MCL 768.7a(2). The time he has served on his new sentence in excess of the 98 days of jail credit must first be applied to that remaining portion instead of defendant's new sentence, with any time left over then being counted toward his new sentence. If defendant has not yet served an amount of time in excess of the 98 days of jail credit sufficient to satisfy the remaining portion of his original sentence, then the new sentence must be suspended until defendant has completed that length of time. Because the majority reaches a different result using what I view as an erroneous and incomplete reading of the statutes, and because the majority would perpetuate the present arbitrariness of the parole system by failing to require an affirmative determination from the Board, I respectfully dissent.

In re SERVAAS

Docket No. 137633. Argued March 4, 2009 (Calendar No. 10). Decided July 31, 2009.

The Judicial Tenure Commission (JTC) filed a formal complaint against Judge Steven R. Servaas of the 63rd District Court, alleging that he had vacated his judicial office in violation of Const 1963, art 6, § 20, by changing his primary residence to a different division of his judicial district and that he had failed to comply with statutory notification requirements when he did not change his driver's license information or voter registration to reflect the move. The complaint also alleged that the respondent had engaged in sexually inappropriate conduct toward female court employees, including instances in which the respondent had attached a drawing of a penis and of a woman's breasts to court files. The Supreme Court appointed retired Circuit Judge Casper O. Grathwohl to act as master. After a formal hearing, Judge Grathwohl dismissed the count of failure to comply with statutory notification requirements, but concluded that the respondent had vacated his judicial office in August 2005 in violation of Const 1963, art 6, § 20 and that respondent's sexual communications constituted judicial misconduct and compromised the integrity of the court. The respondent filed objections to the master's report in the JTC. The JTC adopted the master's findings of fact and conclusions of law, except that it found that the respondent had actually changed residences as early as 2000. This finding was based on documentary evidence that was offered solely for impeachment purposes, but was not substantively admitted. The JTC recommended that the respondent be removed from office and assessed fees and costs for having engaged in deceit and intentional misrepresentation.

In a lead opinion by Justice WEAVER, joined by Justices CAVANAGH and HATHAWAY, and an opinion by Chief Justice KELLY concurring in all but part II(A) and the discussions of quo warranto in the introduction and conclusion of Justice WEAVER's opinion, the Supreme Court *held*:

The respondent's conduct concerning the sexual communications was unquestionably inappropriate; however, it did not rise to the level of blatant judicial misconduct requiring the severest possible sanction of removal from office, and it may be viewed as

an aberration given his long record of unblemished service. Accordingly, a sanction of public censure is imposed.

1. The proper forum for reviewing whether the actions of the JTC's executive director violated any ethical rules is the Attorney Grievance Commission.

2. The respondent's sexual conduct was crass and inappropriate; however, it did not rise to the level of judicial misconduct beyond that which requires public censure.

3. A review of the record indicated that the respondent seemed confused regarding specific telephone numbers, dates, times, and other events from nearly 10 years before he testified; however, it did not support a conclusion that the respondent intentionally lied under oath.

Public censure imposed.

Justice WEAVER stated further in the lead opinion that the record did not support a conclusion that the respondent lied under oath with respect to his residence. The only appropriate forum to determine whether the respondent vacated his judicial office was a quo warranto action filed by the Attorney General in the Court of Appeals. The JTC does not have the authority to bypass submission of the quo warranto action or the power to determine whether a judge has vacated his or her office in violation of Const 1963, art 6, § 20.

Justice WEAVER, joined by Justice HATHAWAY, concurring, wrote separately to request that the Supreme Court open an administrative file to investigate the events and actions of the JTC and others responsible that led to the JTC's recommendation of this case to this Court.

Chief Justice KELLY, concurring in part and dissenting in part, concurred with Justice WEAVER's lead opinion with the exceptions of part II(A) and those portions of the introduction and conclusion discussing quo warranto, and also concurred with part II of Justice MARKMAN'S opinion, which stated that the existence of an action for quo warranto did not prevent the JTC from assessing the respondent's misconduct, regardless of whether that conduct involved the improper exercise of a title to office. She would find from the respondent's admission that he moved that the respondent did vacate his judicial office and agreed that public censure was the appropriate sanction for the respondent's vacating his office and inappropriate sexual conduct.

Justice MARKMAN, joined by Justice CORRIGAN, dissenting, agreed with the unanimous recommendation of the JTC that the respondent's misconduct in this case warranted his removal from office.

In moving outside the district from which he was elected, respondent violated the law and the Michigan Constitution, and he breached the fundamental bond with the people of his district established by our system of republican self-government. He then engaged in a pattern and practice of actions to conceal this misconduct, including providing false testimony under oath.

Justice CORRIGAN, dissenting, joined Justice MARKMAN's dissenting opinion in all respects and parts A and B of Justice YOUNG's dissenting opinion. She wrote separately to state that although the JTC executive director employed unnecessarily harsh tactics when confronting the respondent, the respondent has not established special facts and circumstances that created an intolerably high risk of unfairness, which is required for finding a due process violation. The procedures employed in this case were sufficient to ensure due process: a master was appointed to find the facts that formed the basis for the JTC's decision, the JTC's decision was only a recommendation to the Supreme Court, and the Supreme Court bears the ultimate responsibility on its de novo review to decide what, if any, discipline is warranted.

Justice YOUNG, dissenting, joined parts V(A) and (C) of Justice MARKMAN's opinion and would adopt the recommendation of the JTC and remove the respondent from office. Justice YOUNG declined to address whether the JTC has the authority to determine whether the respondent vacated his office during the course of judicial disciplinary proceedings because the respondent admitted that he had done so from August 2005 to February 2008. Justice YOUNG concluded that the respondent engaged in misconduct that provided a sufficient basis for his removal when he lied under oath during the JTC proceedings and in an application for a license to carry a concealed weapon. Moreover, the respondent failed to comply with statutory requirements for address changes to his driver's license and voter registration and fraudulently continued to vote in his election division. Additionally, the respondent gave court personnel an after-hours telephone number to his property located in his election division, from which calls were forwarded to his property outside his election division. All of these actions were a calculated and deliberate effort to make it appear as though the respondent was still living in the first election division, and are completely inconsistent with his claim that he reasonably believed that he could live anywhere within the 63rd District. Justice YOUNG would conclude that, once it is determined that a respondent lied under oath, the only appropriate sanction is removal from office. The sanctity of the oath represents a longstanding tenet of our judicial system. When a judge lies under oath, he or she lacks the necessary character to be entrusted with judicial privilege and becomes unfit to sit in judgment of others.

Paul J. Fischer and *Thomas L. Prowse* for the petitioner.

Miller Johnson (by *John R. Muth*, *James S. Brady*, and *Monica C. Inhulsen*) for the respondent.

WEAVER, J. The Judicial Tenure Commission (JTC) recommended that this Court remove 63rd District Court Judge Steven Servaas (respondent) from office for vacating his judicial office, as well as for judicial misconduct involving a comment and two drawings of a sexual nature. Because we conclude that the only appropriate forum to determine whether respondent vacated his judicial office is a quo warranto action filed by the Attorney General in the Court of Appeals, we reject the JTC's recommendation as to the vacation of office claim. Respondent's conduct concerning the comment and two drawings was unquestionably inappropriate; however, a majority of this Court concludes that respondent's conduct did not rise to the level of blatant judicial misconduct requiring the most severe sanction: removal from office. In this respect, we view respondent's actions as an aberration given his 35 years of apparently unblemished service as judge of the 63rd District Court. Accordingly we impose public censure only.

I

Respondent is a judge of the 63rd District Court, 1st Division, in Rockford, Michigan. On February 14, 2008, the JTC filed Formal Complaint No. 84,[1] alleging that respondent had committed judicial misconduct in violation of Const 1963, art 6,

[1] On both January 17, 2008, and February 14, 2008, the JTC filed petitions for interim suspension without pay pending final resolution of this matter. Both petitions were denied by this Court.

§ 20;[2] MCR 9.104[3] and MCR 9.205;[4] and the Michigan Code of Judicial Conduct (MCJC), Canons 1,[5]

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[2] See note 8 of this opinion.

[3] MCR 9.104(A) states in part:

> The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> (1) conduct prejudicial to the proper administration of justice;
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
>
> (3) conduct that is contrary to justice, ethics, honesty, or good morals;
>
> (4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court[.]

[4] MCR 9.205 states in part:

> (A) Responsibility of Judge. A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides.
>
> (B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for . . . misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice. . . .
>
> (1) Misconduct in office includes, but is not limited to:
>
> * * *
>
> (c) persistent failure to treat persons fairly and courteously;
>
> (d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic[.]

[5] Canon 1 of the Code of Judicial Conduct states in part:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing,

2(A) through (C),[6] and 3A(3).[7]

Specifically, the first count of the complaint alleged that respondent vacated his judicial office in violation of Const 1963, art 6, § 20[8] when he changed his primary residence from Cannon Township, which is located in the 1st Division of the 63rd District Court, to Ada Township, which is located in the 2nd Division of the same judicial district.[9] The second count of the com-

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maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary.

[6] Canon 2 of the Code of Judicial Conduct states in part:

> A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. . . .
>
> B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.
>
> C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others.

[7] Canon 3(A)(3) Code of Judicial Conduct provides:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

[8] Const 1963, art 6, § 20, provides that "[w]henever a justice or judge removes his domicile beyond the limits of the territory from which he was elected or appointed, he shall have vacated his office."

[9] Justice MARKMAN's argument conflates the complaint of vacation of office with the other complaints concerning inappropriate sexual conduct. In doing so, he asserts that it is perfectly appropriate for the JTC to bring an action asserting vacation of office, along with any other

plaint alleged that respondent failed to comply with statutory notification requirements when he failed to change his driver's license information and voter registration to reflect his move to Ada Township.

The third count of the complaint alleged that respondent engaged in sexually inappropriate conduct directed toward female court employees, citing three specific examples. In the first instance, it was alleged that respondent drew female breasts on a note that was attached to a court file. The drawing was made after a female clerk commented on the revealing dress of a woman who appeared in court. The second event concerned the drawing of a penis that appeared on a note attached to a court file. The third instance occurred during a retirement party for an employee at the 2nd Division courthouse. While at the party, respondent commented on a university sweatshirt worn by a female

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assertions concerning disciplinary conduct. A study of Const 1963, art 6, § 30(2), and MCR 9.205(B) contradicts this argument. Specifically, the JTC's authority is limited to bringing actions against a judge

> for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. [Const 1963, art 6, § 30(2).]

The JTC has no authority to complain that a judge has vacated his office.

An *allegation of vacation of office* is distinct from the JTC's authority to recommend to this Court that a judge be *censured by removal* from office. Further, Justice MARKMAN asserts, without citing any authority, that it is perfectly appropriate for a quo warranto complaint to be combined with complaints for *judicial misconduct*. To the contrary, pursuant to MCR 3.306(A)(1), an action for quo warranto "must be brought in the Court of Appeals." MCR 3.306 says nothing about whether the JTC has *any* legal authority to bring a complaint of quo warranto and a complaint of judicial misconduct in a JTC proceeding. An allegation of quo warranto is not magically converted into another kind of judicial misconduct simply by linking the allegation to actual judicial misconduct complaints.

clerk employed in the 2nd Division. Respondent stated that the woman had "an awfully small chest" for the college indicated on the sweatshirt and "should have gone to a smaller school like Alma," which would have fit her "small chest better."

On March 5, 2008, this Court appointed the Honorable Casper O. Grathwohl as master to hear the case. The master's report, issued on May 12, 2008, concluded that respondent vacated his judicial office in violation of Const 1963, art 6, § 20 when he changed his principal residence from the 1st Division to the 2nd Division of the 63rd District Court in August 2005. The master recommended that the second count of the complaint be dismissed.[10] The master further concluded that respondent's "sexual doodles and sexual communication" constituted judicial misconduct and compromised the integrity of the court.

Respondent filed objections to the master's report. The JTC issued its decision and recommendation for an order of discipline on October 17, 2008. The JTC adopted the master's findings of fact and conclusions of law, with the exception of finding that respondent had moved to the 2nd Division "as early" as 2000. In making this factual finding, the JTC relied on documentary evidence that was offered solely for impeachment purposes in the proceedings before the master, but was not substantively admitted.[11] On the basis of the findings of

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[10] The examiner did not file any objections to the master's report, as required by MCR 9.215. Despite the apparent forfeiture of the issue, however, the JTC "agree[d] with and adopt[ed]" the master's conclusions regarding count II. In light of the forfeiture of the issue, it will not be further discussed in this opinion.

[11] The examiner indicated that he did "not intend to offer" the documents into evidence because he had not provided respondent with copies of the exhibits as required by both the pretrial order and MCR 9.208(C)(1)(a)(i).

fact and conclusions of law, the JTC recommended that respondent be removed from office. The JTC further recommended that respondent be assessed fees and costs in the amount of $8,364.38 because respondent "engaged in deceit and intentional misrepresentation."

II

This Court reviews the recommendations and findings of the JTC de novo.[12] The standard of proof in judicial disciplinary proceedings is a preponderance of the evidence.[13]

A. VACATION OF OFFICE

Const 1963, art 6, § 20, provides that "[w]henever a justice or judge removes his domicile beyond the limits of the territory from which he was elected or appointed, he shall have vacated his office." The parties agree that the term "domicile" refers to respondent's primary residence. Furthermore, respondent *admits* that he changed his primary residence to the second election division from 2005 to 2008.[14] The dispute centers on the meaning of the word "territory." Respondent argues that "territory" refers to the entire 63rd Judicial District, while the JTC argues that the term is limited to the election division within the district. Thus, when respondent moved his primary residence from the first election division to the second election division of the 63rd District Court, the JTC maintains that respondent

[12] MCR 9.225; *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971).

[13] *In re Loyd*, 424 Mich 514; 384 NW2d 9 (1986).

[14] Although the JTC found that respondent moved from the first election division to the second election division in 2000 rather than 2005, in light of respondent's admissions, that finding adds no weight to the allegations that respondent vacated his office.

vacated his office, possessed no authority to continue to serve as a judge, and functioned as a "nonjudge masquerading as a judge."

However, this Court need not address which argument is correct, nor reach a conclusion regarding whether respondent vacated his office because our statutes, caselaw, and court rules provide that a quo warranto action brought by the Attorney General in the Court of Appeals *is the only appropriate and exclusive proceeding to make the preliminary determination regarding whether respondent vacated or unlawfully held his judicial office*.[15]

MCL 600.4501 provides that the Attorney General shall bring an action for quo warranto "when the facts clearly warrant the bringing of the action."[16] MCR 3.306(A)(1) provides that the quo warranto action *must*

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[15] Justice MARKMAN, *post* at 664, asserts that another reason that the JTC, and not the Court of Appeals, can bring a vacation of office complaint is that the quo warranto statute, MCL 600.4505, implies that actions for quo warranto may only be brought for "claims that a public official is *currently* exercising an invalid title to office." At the time the JTC brought its complaint for vacation of office against the respondent, respondent *was currently* in office. There is no support for this argument in MCL 600.4505, and *In re Kapcia*, 389 Mich 306; 205 NW2d 436 (1973), does not support this assertion. Rather, the Court in *Kapcia* declared that its opinion did not consider whether a quo warranto action by the Court of Appeals was required for a judge who had lost his license to thereafter determine whether the judge had vacated his office. Wisely, that Court recognized the Court of Appeals initial exclusive jurisdiction with respect to quo warranto proceedings. Justice MARKMAN, *post* at 670 n 16, asserts that *Kapcia* establishes that the JTC cannot use any other entity's findings, including those of the Court of Appeals. Again, with respect to a quo warranto proceeding, the JTC *has no authority to make a finding* that a judge improperly vacated his office. The JTC only has the authority to recommend what disciplinary measure should be exercised by this Court based on the exclusive right of the Court of Appeals to make the determination in a quo warranto proceeding.

[16] If the Attorney General refuses to act, a private party may bring the action upon leave of the court. MCL 600.4501.

be brought in the Court of Appeals when a person "usurps, intrudes into, or unlawfully holds or exercises a state office" or if a state officer "does or suffers an act that by law works a forfeiture of the office." If a quo warranto action claims usurpation of office, the judgment "may determine the right of the defendant to hold the office."[17] Moreover, if a defendant in a quo warranto proceeding is found to unlawfully hold or exercise the office at issue, the defendant may be assessed fines[18] and damages[19] in addition to being ousted from office. Significantly, our caselaw has held for more than a century that "[t]he *only way* to try titles to office finally and conclusively is by *quo warranto*."[20]

Notwithstanding, the JTC asks this Court to make the prefatory determination that respondent vacated his office under Const 1963, art 6, § 20, and that he consequently "was no longer a judge" and acted "without judicial authority," as a basis of removing respondent from office for judicial misconduct. However, this determination is *precisely* the issue to be resolved in a quo warranto action. While this Court could certainly review on appeal the decision made by the Court of Appeals in a quo warranto action,[21] and could determine

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[17] MCL 600.4505(1).

[18] MCL 600.4515.

[19] MCL 600.4511.

[20] *Frey v Michie*, 68 Mich 323, 327; 36 NW 184 (1888) (emphasis added). See also *Metevier v Therrien*, 80 Mich 187, 45 NW 78 (1890); *People v Kongeal*, 212 Mich 307, 317, 180 NW 636 (1920) (cannot attack "the legal existence of such a court or its de facto officers otherwise than in a direct proceeding by quo warranto"); *Gildemeister v Lindsay*, 212 Mich 299, 180 NW 633 (1920); *Sempliner v FitzGerald*, 300 Mich 537, 2 NW2d 494 (1942); *Cook v Burhans*, 304 Mich 108, 7 NW2d 370 (1942); *People v Russell*, 347 Mich 193, 79 NW2d 603 (1956); *Layle v Adjutant General*, 384 Mich 638, 641; 186 NW2d 559 (1971) ("[Q]uo warranto is the proper and exclusive remedy to try title to office . . . .").

[21] MCR 7.301(2).

whether the conduct surrounding respondent's forfeiture of office rose to the level of judicial misconduct warranting judicial discipline,[22] an original proceeding in the Supreme Court[23] is not the appropriate place to determine in the first instance *whether* respondent vacated his office. Rather, the law requires that this question be initiated by the Attorney General and resolved as an initial matter by the Court of Appeals.[24]

Consequently, all evidence and testimony obtained during the proceeding by the JTC regarding whether respondent had vacated his office was obtained through an unconstitutional process because the JTC has no authority to proceed on the quo warranto issue or to determine whether respondent vacated his office. That determination can only be made by the Court of Appeals in a quo warranto proceeding, which could then be appealed to this Court. If a quo warranto action has been successfully brought in the Court of Appeals, and that decision is affirmed by this Court, only then may the JTC act on the appellate court decision and determine whether there has been any judicial misconduct associated with the determination of the Court of Appeals that a judge has vacated his or her office.

Moreover, had the Michigan Supreme Court decided in a quo warranto appeal that respondent *had* vacated

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[22] Const 1963, art 6, § 30; MCR 9.225. Because no quo warranto action was filed and no determination was made regarding whether respondent vacated his office, we need not determine whether the act of vacating judicial office constitutes sanctionable judicial misconduct.

[23] MCR 7.304.

[24] By analogy, Const 1963, art 6, § 30(2), provides that this Court may discipline, retire, or remove a judge for conviction of a felony. It could hardly be argued, however, that this Court rather than the circuit court should adjudicate and convict the judge of the felony simply because the unresolved predicate issue arose during the course of a judicial disciplinary proceeding. *In re Laster*, 404 Mich 449, 274 NW2d 742 (1979), cited by the JTC, is simply not responsive to this issue.

his office, the Supreme Court would have had the power to remove respondent from office, and, had that happened, any JTC proceeding regarding judicial misconduct involving the vacation of office would have been moot because the Supreme Court had already exercised the most severe punishment. Simply put, the JTC had the cart before the horse.

Just as the JTC has neither the authority nor the power to decide whether a judge vacated his or her office, this Supreme Court does not have any constitutional authority to grant that authority and power to the JTC. The JTC only has the authority to let the quo warranto process lawfully proceed to a legal determination of whether or not a judge has vacated his or her office.

With regard to our conclusion in this regard, we reject Justice MARKMAN's attempt to characterize the JTC as having made a "determination" to which this Court must defer. The JTC only has the authority to "recommend" disciplinary action. Justice MARKMAN's attempt to couch our "rejection" as unbelievable is improper. Indeed, Justice MARKMAN asserts that a majority of this Court errs in its review of the JTC decision by "afford[ing] *no deference whatsoever* to the commission's factual findings." *Post* at 655 (emphasis added). To be precise, while this Court has a *duty to review* a recommendation, as to the deference afforded the JTC after this Court reads the recommendation, there is no *duty to accept*, or to defer, to any part of the JTC's recommendation. This Court has no duty to accept, even in part, any JTC "decision" because the JTC does not have the power to decide how and whether to discipline a judge; the JTC can only make *recommendations* to this Court and, in this regard, our review of

JTC recommendations is de novo.[25] *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971).

As established in Const 1963, art 6, § 30(2):

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent

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[25] Contrary to Justice MARKMAN's assertion, our decision today does not affect the standard by which this Court reviews JTC recommendations. As Justice MARKMAN accepts, we review the JTC's recommendations de novo. *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971). And we are aware of no mandate that this Court give deference to the JTC's "decisions." The Michigan Constitution does not require that we give any deference to the JTC's "decisions." Moreover, we have held that any deference given to the JTC's "recommendations" is contingent upon us finding that the JTC's analysis was "reasonably done." *In re Chrzanowski*, 465 Mich 468, 488; 636 NW2d 758 (2001). In this case, for the reasons noted in this opinion, we conclude that the JTC's analysis fell below the "reasonably done" threshold. We have also limited any deference regarding factual findings to the *master's* credibility determinations. *Loyd*, *supra* at 535-536. That deference was further limited to when the credibility determination was supported by the whole record. *Id*. We have never articulated a deference requirement toward the JTC's credibility determinations. This is an important distinction in this case because the JTC did not accept the master's credibility determinations; instead, it went beyond the master's conclusions and, as Justice MARKMAN rightly states, "decided" that respondent had moved out of his division at a date earlier than when the master had determined. Notably, it was this "decision" on which the JTC hinged its removal recommendation. Thus, any deference to a credibility determination would apply to the master's findings, assuming that they were supported by the entire record; it would not apply to the JTC's contrary "decision." This is yet another reason for us to conclude that the JTC's "recommendation," much less its "decision," granted no deference in this case. It is unclear why Justice MARKMAN believes we are required to give the JTC's "decisions" deference. Further, assuming Justice MARKMAN is correct that this Court is bound to give some modicum of deference to the JTC's recommendations, that rule does not apply here because the JTC's analysis was not reasonably done, and its credibility conclusions are contrary to those of the master.

> failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.

For comparison purposes, consider this scenario: if the JTC believes a judge has committed armed robbery, it has no authority to proceed to determine whether or not the judge did commit armed robbery. Only the criminal judicial system guided by statutes and court rules has the authority to make that determination. If the court process legally determines a judge is guilty of armed robbery, only then can the JTC recognize the legally determined fact that the judge committed the crime and only then can the JTC bring a proceeding for judicial misconduct on the basis of the court's ruling that a judge committed the crime of armed robbery.

B. CONDUCT OF THE EXECUTIVE DIRECTOR OF THE JTC

On January 16, 2008, the executive director of the JTC personally served respondent with a 28-day notice pursuant to MCR 9.207(D)(1).[26] The executive director arrived unannounced at respondent's chambers accompanied by an armed Michigan State Police lieutenant. Apparently, unbeknownst to either respondent or the director, the police officer recorded the conversation.

The director presented respondent with the 28-day notice, and asserted that respondent's office was "vacant" because respondent had moved outside his district, as evidenced by his homestead tax exemption

[26] The notice must be given 28 days before filing a complaint. The "purpose of the notice is to afford the judge the opportunity to apprise the commission, in writing within 28 days, of such matters as the judge may choose, including information about the factual aspects of the allegations and other relevant issues." MCR 9.207(D)(1).

affidavit.[27] In addition to the notice, respondent was also presented with a petition for interim suspension without pay, which the director indicated would be immediately filed and mostly likely granted because respondent was "not in office."

The director then offered respondent the "opportunity to resolve" the matter quickly without any "shame, proceedings, [or] accusations of perjury" by resigning "immediately,"[28] presenting respondent with a prepared resignation letter on respondent's court letterhead. The director stated that, although the JTC indicated that respondent had until 9:00 a.m. the next morning to sign the resignation letter, the director would "prefer" to have the resignation letter signed "right now" so that he could "take the letter with" him.

When the respondent protested, seeking "time to talk to somebody," the director replied that respondent would be "suspended in a matter of days" and that it would all "become public" at a time when respondent was "up for election." The director reiterated the 9:00 a.m. deadline, adding that respondent also faced allegations involving the sexually inappropriate behavior, and the director would get respondent "thrown off [the bench] just for that." When respondent asked questions regarding the basis of the allegations of sexually inappropriate behavior, the director replied that he was not there "to do any type of interview" and would not "explain anything else."

The director told the respondent that he could "take the easy way out" and sign the resignation letter; otherwise, the director "welcome[d] the opportunity"

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[27] The director indicated that, if respondent had not abandoned his office, then he must have filed a false affidavit, which constituted the crime of perjury.

[28] The director reiterated that "immediately means immediately."

and would "engage to the fullest" if respondent chose to "fight it." When respondent observed that criminal defendants were given "more consideration" than was being afforded to him, the director responded that immediately signing the resignation letter would "avoid having to drag [respondent's] name through the mud," "avoid any embarrassing situations," and avoid the "stain to the state judiciary" of having a judge who "violates the law, commits perjury, [and] sexually harasses staff." After respondent refused to sign the resignation letter on the spot, the meeting concluded. A moment later, the director was heard saying that "it's like shooting ducks in a barrel."

When these proceedings commenced, the director's threats to humiliate respondent and drag his name through the mud were soon realized. The details of the present allegations were widely disseminated in the local newspapers, on television, and on the Internet over the course of several months. The controversy, including the facts surrounding the meeting between respondent and director, were the subject of numerous newspaper articles, editorials, and letters to the editor.[29] While the actions of the JTC director have been called into question, this Court need not address whether he violated any ethical rules because the proper forum for the review of the JTC director's actions is the Attorney Grievance Commission.

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[29] *Disorder in the District Court?* Grand Rapids Press, January 15, 2008, at B2; *Servaas battles to stay on bench*, Grand Rapids Press, February 16, 2008, at A1; *Residents critical of inquiry involving judge*, Grand Rapids Press, February 17, 2008, at B1; *Rockford rallies around judge*, Grand Rapids Press, February 20, 2008, at B1; *Deputies support Servaas' bid*, Grand Rapids Press, February 27, 2008, at B1; Servaas *attack called 'reckless'*, Grand Rapids Press, March 1, 2008, at A3.

C. INAPPROPRIATE DRAWINGS AND COMMENT

The remaining allegation of judicial misconduct concerns respondent's sexually inappropriate conduct directed toward female court employees. The testimony indicates that on two separate occasions respondent made lewd drawings—one of female breasts and one of a penis—on notes that were attached to two court files. The testimony further indicates that respondent commented on the small chest size of a 2nd Division female employee during a retirement party at the 2nd Division courthouse. Notably, even respondent realized he had made a mistake because he called the employee the following day to apologize personally to her. Unfortunately, she would not return his calls, so he finally left a message on her voice mail apologizing for the gaffe.

Respondent's counsel acknowledged that respondent's conduct was "inappropriate," but contended that it was spontaneous and represented "isolated" incidents from respondent's nearly 37-year career. Respondent's counsel argues that respondent's conduct warrants, at most, a public reprimand. This argument is consistent with the recommendations of the JTC, which indicated that with respect to count 3, respondent's sexually inappropriate conduct merited a public censure.

We agree with the JTC that respondent's sexual conduct was crass and inappropriate; however, we do not agree that respondent's conduct rises to the level of judicial misconduct beyond requiring public censure.

D. VERACITY OF RESPONDENT'S TESTIMONY

While Justice MARKMAN appears to assert that whether or not the JTC had the authority to proceed, sanctions against respondent are appropriate given

Justice MARKMAN's conclusion that respondent lied under oath. Having reviewed the entire record closely, we do not agree with Justice MARKMAN's conclusion that respondent lied under oath.[30] On the contrary, we agree with respondent's counsel that this is not a case of arrogance. Instead, it appears that respondent believed that he was still properly in his district and that there was no problem with living outside of the 1st Division.

At the time these proceedings occurred, respondent had seven residences. He owned homes in both the 1st and 2nd divisions of the 63rd District Court. He rented a home in the 1st Division, and he also owned homes in Whitefish Lake, Michigan; Ludington, Michigan; North Carolina; and Florida. Respondent testified that he renovates houses as a hobby, and that from 2000 to 2005, he often spent the night at one of the two houses he was renovating in the 2nd Division when he was too tired to drive back to his 1st Division residence.

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[30] In fact, respondent's admissions of moving to the 2nd division house establish that respondent believed he had nothing to hide because, under his interpretation of the law, he did not "vacate his office" if he simply lived in another division of the same district. Further, respondent's failure to change the address on his concealed weapons permit does not establish that he intended to deceive anyone. In the first instance, respondent was *renewing* his permit. Since November 13, 2001, the date the respondent first applied for the permit, his address remained the same. In fact, as demonstrated by succeeding safety inspection certificates and by his own testimony for succeeding years, respondent did not even pay attention to the address line as it had already been completed for him by the Rockford Chief of Police. All he had to do was sign the permit. Again, rather than a deliberate attempt to deceive officials about his change of address, respondent's explanation was very credible. Specifically, the failure to change his address was simply an oversight: respondent did not think to read the form and make any corrections, as he admitted that he did not read the form—he just put the gun and the renewed certificate under the bench.

Thus, during this five-year period, respondent testified that he went back and forth between the houses as necessary for the remodeling projects. Certainly he cannot be expected to have to subsequently provide facts establishing that he was residing in one house or two houses after so much time had passed and without being prompted by any particular reason to so do. Again, respondent's actions in this regard support his perception that it didn't matter whether he spent the night at the 1st Division house or the 2nd Division house, because he was still residing in the 63rd District.

Respondent admitted that from 2005 on, he resided in the 2nd Division home, and the record reflects that he did nothing to hide this fact. Indeed, respondent's name, address, and telephone number for the 2nd Division home were listed in the local phone book.

Specifically during a meeting in approximately late March 2006 between respondent, the State Court Administrator, and the JTC executive director, the State Court Administrator, said to respondent, "You're not living in your district." In response, respondent said "I am too." Importantly, we note that even though respondent was first accused of vacating his judicial office in early 2006, it appears that no assertion was made again until respondent was ambushed on January 16, 2008. Again, respondent did not try to deny the fact that he was living in the 2nd Division at that time, because he thought he could live in that division as long as he was not running for reelection.

Consequently, we do not conclude that respondent lied under oath. At times he seemed confused and could not remember a series of different telephone numbers (until he later refreshed his recollection), specific dates and times, and events that occurred nearly 10 years

before he testified. In fairness, we cannot conclude that respondent intentionally lied under oath.

III. CONCLUSION

Because we conclude that the only appropriate forum to determine whether respondent vacated his judicial office was a quo warranto action filed by the Attorney General in the Court of Appeals, we reject the JTC's recommendation with respect to the vacation of office claim. Because the JTC lacked legal authority to bypass submission of the quo warranto action by the Attorney General, the finding that respondent vacated his office is null and void. The powers held by the JTC simply do not include the power by the JTC to determine the existence of a vacancy in judicial office.

Finally, with respect to the claim against respondent for judicial misconduct involving a comment and two drawings of a sexual manner, while respondent's conduct was unquestionably inappropriate, we believe, under the unique circumstances of this case that only public censure is required. Accordingly, this opinion stands as our public censure.

Pursuant to MCR 7.317(C)(3), we direct the Clerk of the Court to issue the judgment order immediately.

CAVANAGH and HATHAWAY, JJ., concurred with WEAVER, J.

WEAVER, J. (*concurring separately*). I authored and join the lead opinion; however, I write separately to request that this Court open an administrative file to investigate how this matter unfolded, including the events and actions of the Judicial Tenure Commission (JTC) and/or others responsible leading up to the JTC's recommendation of this case to this Court.

HATHAWAY, J., concurred with WEAVER, J.

KELLY, C.J. (*concurring in part and dissenting in part*).[*] I concur in Justice WEAVER's lead opinion except for part II(A) and the portions of the introduction and conclusion discussing quo warranto.

I agree with Justice MARKMAN that the existence of an action for quo warranto does not prevent the Judicial Tenure Commission from assessing respondent's misconduct, regardless of whether that conduct happens to in volve the improper exercise of a title to office. Accordingly, I concur in part II of Justice MARKMAN's opinion. Given Judge Servaas's admission that he moved outside his election division, I find that he did vacate his judicial office.

Under the unique facts of this case, I find that public censure is the appropriate sanction for the violations of counts I (vacating judicial office) and III (inappropriate sexual conduct).

MARKMAN, J. (*dissenting*). The Court today rejects the unanimous recommendation of the nine-member Judicial Tenure Commission (JTC) to sanction respondent, Judge Steven Servaas, for misconduct that involves moving outside of the district from which he was elected in direct violation of Article 6, § 20 of the Michigan Constitution, and MCL 600.8201, and thereby fundamentally breaching faith with his constituents; and by then engaging in a pattern and practice of actions to conceal this misconduct, including providing false testimony under oath. Based on the Commission's findings and on the record below, I agree with the JTC, and disagree with the majority in its refusal to sanction respondent for conduct directly implicating the integrity of the judiciary. I therefore dissent.

Moreover, in rejecting the JTC's unanimous determination that respondent lied under oath, the majority affords no deference whatsoever to the Commission's factual findings.[1] Instead, the majority engages in a

[*] Amended by order entered September 11, 2009, 485 Mich 869—REPORTER.

[1] Justice WEAVER asserts that this Court has "no duty to . . . defer . . . to

superficial analysis that does not accurately reflect the record established in this case.

Perhaps most remarkably, in asserting that the JTC lacks jurisdiction to sanction respondent, Justice WEAVER in her lead opinion (albeit not a majority opinion in this regard) concludes that the JTC lacks even the *authority* to investigate a judge for breaching his or her constitutional obligations, on the grounds that the JTC is forbidden even to undertake actions regarding judicial misconduct if such misconduct could "in the first instance" have been addressed by an alternative legal proceeding, in this case by an action for quo warranto. Justice WEAVER's assertion is a profoundly distorted interpretation of the JTC's authority and would significantly circumscribe the commission's ability to effectively investigate and address instances of judicial misconduct.

I. FACTS

In January 2008, the JTC initiated proceedings against respondent, asserting that he had moved outside the 1st Division of the 63rd District Court located in Kent County, and from which he had been elected, in violation of the constitution and statutes of this state.[2]

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the JTC's recommendation[s] . . . or . . . decision[s] . . . ." *ante* at 646 (emphasis omitted). It may be worth noting that this statement of firm conviction is directly contrary to *In re Brown*, 461 Mich 1291, 1293 (2000), in which this Court, including Justice WEAVER, stated that "[w]here standards . . . have been promulgated [by this Court] and reasonably applied to individual cases, this Court owes considerable deference to the JTC." Further, in *In re Chrzanowski*, 465 Mich 468, 488; 636 NW2d 758 (2001), again with Justice WEAVER in the majority, this Court stated that "[w]e find [the JTC's] analysis to be reasonably done and therefore accord the recommendations of the JTC considerable deference."

[2] The 63rd District Court has two divisions. The 1st Division includes the cities of Cedar Springs and Rockford, and the townships of Tyrone, Solon, Nelson, Spencer, Sparta, Algoma, Courtland, Oakfield, Alpine, Cannon, Plainfield, and Grattan, and "has 1 judge." MCL 600.8130(4)(a). The 2nd Division encompasses the township of Ada, as well as the cities

This belief was premised on respondent having moved his residence to 201 Honey Creek Avenue, a property located in the 63rd District's 2nd Division. On January 16, 2008, the JTC's examiner, accompanied by an officer from the Michigan State Police, went to respondent's office to deliver charging papers. The examiner communicated the JTC's belief that respondent had moved outside his division and, therefore, had vacated his office. The examiner told respondent he could resign by the next day or else be subject to disciplinary proceedings, including an immediate petition for interim suspension without pay. Respondent did not resign.

On January 17, 2008, the JTC filed a petition for interim suspension with this Court on the ground that respondent's residence was outside the 1st Division. The next day, the JTC filed a supplemental petition, arguing that respondent had created a "dangerous situation" by keeping a loaded pistol behind his bench.[3] This Court unanimously denied this petition on February 1, 2008.

On February 14, 2008, the JTC filed a second petition for interim suspension, setting forth the additional argument that respondent had removed himself from his elected division and also engaged in inappropriate behavior. The JTC also filed a complaint against respondent on the same day. The complaint alleged that respondent had vacated his judicial office by moving his

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of East Grand Rapids and Lowell, and the townships of Grand Rapids, Cascade, Vergennes, Lowell, Byron, Gaines, Caledonia and Bowne, and also "has 1 judge." MCL 600.8130(4)(b). Respondent has been regularly elected to, and has maintained his courtroom in, the 1st Division in Rockford, Michigan since January 1973.

[3] During the examiner's visit on January 16, 2008, the Michigan State Police officer confiscated the pistol from an unlocked box behind the bench. The examiner did not allege any misconduct in the complaint based on the pistol, and respondent possessed a valid concealed weapons permit.

residence from the 1st Division to the 2nd Division, and that he was not a registered elector of the division from which he was an elected judge. The complaint also alleged that respondent engaged in misconduct directed toward female court employees. This Court unanimously denied the second petition on April 9, 2008.

Pursuant to MCR 9.210(B)(1) we appointed a master to hold hearings and make findings of fact and law.[4] The master held a hearing between March 28, 2008, and April 3, 2008, to determine the merit of the allegations contained in the JTC's complaint. The master found that respondent had moved to 201 Honey Creek in 2005 in violation of article 6, § 20 of the Michigan Constitution. By doing so, he was also no longer a "registered elector" of the 1st Division as required by MCL 600.8201. Thus, the master concluded that respondent had failed to comply with the constitutional and statutory requirements necessary to hold a judicial position, in violation of Canon 2(B) of the Code of Judicial Conduct.[5] The master also concluded that certain inappropriate drawings and comments on respondent's part constituted judicial misconduct and compromised the integrity of the court. Respondent then filed objections with the master's findings to the JTC in accordance with MCR 9.215.[6]

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[4] The master was Casper O. Grathwohl, a retired judge from the 2nd Circuit Court in Berrien County.

[5] Canon 2(B) of the Code of Judicial Conduct states in part:

> A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary.

[6] MCR 9.215 states in part:

> [T]he examiner or the respondent may file with the commission an original and 9 copies of a statement of objections to the report of the master, along with a supporting brief.

On October 17, 2008, the JTC unanimously agreed with, and adopted, the master's findings, except that the commission found that respondent had, in fact, moved to 201 Honey Creek in Ada Township in 2000 rather than 2005.[7] This finding was based primarily on telephone logs that the examiner had introduced during the master's hearing. These logs contained telephone numbers that respondent had provided to the district court indicating where he could be located after hours,[8] and showed that respondent provided his 201 Honey Creek telephone number almost exclusively as his after-hours contact location from 2000 until 2008. From these logs, the JTC concluded that respondent's consistent listing of 201 Honey Creek as his after-hours location for an eight-year period indicated that he, in fact, had lived at 201 Honey Creek during that time. Moreover, the JTC found that respondent's assertion that he had not moved outside of his division prior to 2005 demonstrated a "lack of candor and honesty," which amounted to "false testimony" as to his residence from 2000 to 2005.

Based on these findings, the JTC recommended that respondent be removed from office. He now challenges that recommendation and argues that this Court lacks

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[7] MCR 9.220(B)(1) authorizes the JTC to adopt the master's findings in whole or in part, and provides:

> The commission must make written findings of fact and conclusions of law along with its recommendations for action with respect to the issues of fact and law in the proceedings, but may adopt the findings of the master, in whole or in part, by reference.

[8] As part of his judicial duties, respondent was required to be "on call" several nights per week in order to respond to police requests for warrants, and for other emergencies. Judges and magistrates rotated being on call, and were required to provide an after-hours contact number at which they could be reached.

the authority to sanction him for judicial misconduct because an action for quo warranto constitutes the exclusive legal proceeding to evaluate his title to office before his November 2008 reelection.

II. QUO WARRANTO

Justice WEAVER agrees with respondent and asserts that this Court need not decide whether the allegations set forth in the complaint are true "because our statutes, caselaw, and court rules provide that a quo warranto action brought by the Attorney General in the Court of Appeals *is the only appropriate and exclusive proceeding to make the preliminary determination regarding whether respondent vacated or unlawfully held his judicial office*." *Ante* at 643 (emphasis in original). In my view, Justice WEAVER misapprehends the nature of the action now before this Court, which is a *disciplinary* proceeding that the JTC and this Court are constitutionally empowered to pursue, Const 1963, art 6, § 30(2), not an action directly concerned with respondent's current claim to his office.[9] Most importantly, this Court's authority to sanction judicial misconduct is not restricted, or otherwise affected in any way, by the existence of an action for quo warranto, which is only available for the purposes of removing from public office an official who fails currently to hold valid title to

[9] Although an action for quo warranto is altogether unrelated to the disciplinary action at issue here, Justice WEAVER, and respondent, set forth what I view as an erroneous theory suggesting that the JTC has no authority to use any facts that could support a judicial disciplinary action if those facts could also be used in a quo warranto proceeding. Because, in my judgment, this theory would preclude this Court from considering facts that are necessary to fully address respondent's misconduct and to determine a proportionate sanction, I believe it is necessary to refute this theory. I reiterate, however, that Justice WEAVER's theory, although set forth in the lead opinion, does not have majority support.

that office. Finally, Justice WEAVER's assertion that the JTC, in the context of a disciplinary proceeding which involves the validity of a judge's title to office, *must* rely on the factual findings of the Court of Appeals in a quo warranto action is directly contrary to this Court's own guidance in *In re Kapcia*, 389 Mich 306; 205 NW2d 436 (1973), and would undermine the JTC's duty to make individualized and independent factual findings with regard to whether judicial misconduct has occurred.

The JTC is a constitutionally established entity, Const 1963, art 6, § 30(1), that was created to assist the people of Michigan, and this Court, in evaluating the conduct and behavior of judges currently holding office throughout this state. Article 6, § 30(2) of the Michigan Constitution describes the relationship between the JTC and this Court as follows:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, *misconduct in office*, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. [Emphasis added.]

In MCR 9.205(B), this Court has provided guidance to the JTC for determining what constitutes judicial "misconduct in office":

> A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. In addition to any other sanction imposed, a judge may be

> ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master or the Supreme Court.
>
> * * *
>
> (2) Conduct in violation of the Code of Judicial Conduct or the Rules of Professional Conduct may constitute a ground for action with regard to a judge, whether the conduct occurred before or after the respondent became a judge or was related to judicial office.
>
> (3) In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.

In addition, MCR 9.220(B) expressly authorizes the JTC to make both factual and legal determinations regarding whether a judge has committed misconduct that warrants an official sanction, which may range from a private censure to removal from office, and, as noted at note 7 *supra*, it allows the JTC to adopt the master's findings in whole or in part.

Although the JTC and this Court are constitutionally vested with the authority to address *all* matters of judicial misconduct, Justice WEAVER concludes that this authority is implicitly limited by the existence of an action for quo warranto. Quoting *Frey v Michie*, 68 Mich 323, 327; 36 NW 184 (1888), she notes that the "determination can only be made . . . in a quo warranto proceeding . . . ." *Ante* at 645.

As an initial matter, Justice WEAVER's discussion of quo warranto fails to acknowledge that an action for quo warranto is an entirely distinct legal proceeding

from a disciplinary action initiated by the JTC.[10] As provided in MCR 3.306(A)(1),

> [a]n action for quo warranto against a person who usurps, intrudes into, or unlawfully holds or exercises a state office, or against a state officer who does or suffers an act that by law works a forfeiture of the office, must be brought [by the Attorney General] in the Court of Appeals.

Because an action for quo warranto can be pursued against "a person" who unlawfully holds *any* "state office," including a judgeship, this action, in one sense, has a much broader application than a JTC disciplinary action, which can only be initiated against a judge. However, unlike a JTC proceeding, an action for quo warranto is only available to address a narrowly circumscribed range of judicial misconduct, which is restricted to that calling into question a judge's title to office. To that extent, an action for quo warranto has a more limited application than a JTC disciplinary action. Perhaps most importantly, the fact that these two actions may sometimes be applicable to the same set of facts, does not alter the distinctive nature of each, and certainly does not indicate that the viability of one is somehow restricted by the existence of the other.

Although respondent's conduct did call into question his title to office between 2000 and 2008, there is no statutory or constitutional restriction on the JTC's authority to proceed with an action based upon the misconduct that was represented by his actions. In fact, despite the fact that an action for quo warranto and a

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[10] In light of the distinct nature of these proceedings, as expressly recognized in this opinion, it is remarkable that Justice WEAVER could assert that I somehow claim that "the JTC has . . . legal authority to bring a complaint of quo warranto *and* a complaint of judicial misconduct in a JTC proceeding." *Ante* at 640 n 9 (emphasis added). This is a badly distorted interpretation of what is plainly stated, to wit, that the JTC can never pursue an action for quo warranto under any circumstances.

JTC disciplinary action may overlap in their applicability to some instances of judicial misconduct, as they did here prior to the date respondent began serving his new term of office in 2009, Justice WEAVER has supplied no rationale as to why an action for quo warranto, which was created by the Legislature and this Court, should constitute the exclusive means to address such misconduct, especially in view of the fact that the JTC is the only entity that is constitutionally empowered to address *all* matters of judicial misconduct.

In addition to the fact that an action for quo warranto is altogether distinct from a JTC disciplinary proceeding, there are three supportive arguments for why an action for quo warranto has no application in the instant context. First, an action for quo warranto is only applicable to claims that a public official is *currently* exercising an invalid title to office.[11] This observation is supported by MCL 600.4505, which describes the nature of a quo warranto action:

> (1) In actions brought against persons for usurpation of office, the judgment may determine the right of the defendant to hold the office. If a party plaintiff alleges that he is entitled to the office, the court may decide which of the parties is entitled to hold the office.
>
> (2) If judgment is rendered in favor of a party who is averred to be entitled to the office, he is entitled, after taking the oath of office, and executing any official bond which is required by law, to take the office. Such party shall

[11] Justice WEAVER asserts that "[t]here is no support for [my] argument," *ante* at 643 n 15, that "actions for quo warranto may only be brought for 'claims that a public official is *currently* exercising an invalid title to office.' " Quite apart from the law that has been cited in this section, Justice WEAVER seems to be unaware that a judge who previously held unlawful title to office could never be subject to a quo warranto action because the issue would necessarily be moot.

> be given all the books and papers in the custody of the defendant, or within his power, belonging to the office.

Significantly, MCL 600.4505 uses language written exclusively in the active voice, which suggests that the Legislature did not intend for this action to be initiated against a public official who is not currently holding office or who has previously exercised title to his or her office improperly. Indeed, as indicated in MCL 600.4505, and further supported by MCL 600.4511 and MCL 600.4515, an action for quo warranto is most frequently the procedure employed to resolve *conflicting* claims to office.[12] MCL 600.4511 provides:

> When an action is brought against a person for usurping an office and the person rightfully entitled to the office is a party and avers his right to it, and judgment is rendered in his favor, he is entitled to any damages sustained because of the usurpation by the defendant of the office from which the defendant has been evicted. The claim for damages may be joined with the claim for quo warranto, or brought separately within 1 year after the judgment in the action for quo warranto.

MCL 600.4515 provides:

> Whenever any defendant in a quo warranto proceeding is found or adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise, or

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[12] The only apparent exception to the rule that a quo warranto action may only be brought to oust an officer who is currently exercising authority under an invalid claim to office is described in *Osterhous ex rel Vander Veen v Van Duren*, 168 Mich 464, 466; 134 NW 456 (1912), in which this Court stated:

> Ordinarily proceedings to try title to a public office cannot be brought after the term has expired, or when it is so nearly expired that the inquiry would be of no effect; but an action commenced during the term of office may be prosecuted to final judgment after the expiration of the term, for the recovery of damages or costs which relator has sustained or incurred by the wrongful assumption of authority.

> privilege, judgment shall be rendered that the defendant be ousted and altogether excluded from that office, franchise, or privilege. In addition to awarding costs against the defendant, the court may, in its discretion, impose a fine upon the defendant found guilty, not exceeding $2,000.00.

Thus, MCL 600.4511, again using the active voice, suggests that an action for quo warranto constitutes a procedure intended to resolve conflicting claims to an office, regardless of whether misconduct was involved, by determining which party has the superior current claim.[13] Because there is no dispute as to respondent's

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[13] Although quo warranto is most often used to determine competing claims to an office, *Lamoreaux v Ellis*, 89 Mich 146, 161; 50 NW 812 (1891), nonetheless makes clear that an action for quo warranto may be used to oust a current "intruder" from office even without a competing claim. *Lamoreaux* stated:

> The attorney general ought not to institute proceedings by *quo warranto* upon the relation of a citizen having no claim of title to the office, unless the showing is such as to afford reasonable grounds for the belief that the incumbent of the office is an intruder therein, or one not competent under the Constitution to hold it. [*Id*.]

Indeed, this is the purpose for which the writ was originally employed in England. Although the writ dates back as far as the reign of King Richard I (1189-1199), it was most notably invoked during the reign of King Edward I (1272-1307).

" 'Claimants were to appear before them [itinerant judges riding in circuit], and if it was found that they actually held any franchise, a writ of Quo Warranto would be served on them, requiring them to show by what warrant they claimed to have the liberty of wreck, or gallows, or view of frankpledge, or return of writs, or whatever it might be.' " Frohnen, *The one and the many: Individual rights, corporate rights and the diversity of groups*, 107 W Va L R 789, 818 (2005) (citation omitted). If the claimant could not answer the writ successfully by showing the proper exercise of title, the franchise could be confiscated by the Crown. *Id*. at 819. The writ was then carried over to America in 1685 when King James II unsuccessfully attempted to use quo warranto proceedings to "revok[e] the colonial charters of the proprietary colonies in New England[]" as a method of maintaining control over the colonies. Gitelman, *The separation of law and equity and the Arkansas chancery courts: Historical*

current claim to office, an action for quo warranto has no application to the present facts.

Second, MCL 600.4515 provides that the sole remedy for a quo warranto action is that a "judgment shall be rendered that defendant be *ousted* . . . ."[14] By contrast, a disciplinary action initiated by the JTC can result in a range of sanctions spanning from a simple censure to removal from office, see Const 1963, art 6, § 30(2), and the JTC and this Court must ultimately determine what constitutes a "reasonable relationship," or "proportionality," between particular misconduct and these available sanctions. *In re Brown*, 461 Mich 1291, 1292 (2000). Thus, the inflexible "one size fits all" remedial aspect of a quo warranto action also demonstrates why the disciplinary action being pursued by the JTC is the proper proceeding in which to address respondent's misconduct.

Third, as this Court concluded in *Kapcia*, 389 Mich at 314, the JTC is prohibited from relying on, or adopting, another entity's factual findings and conclusions as a

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anomalies and political realities, 17 U Ark Little Rock L J 215, 228 (1995). Thus, both historically and currently, quo warranto actions have never been used to ascertain whether an officer or franchise-holder *previously* exercised proper title to office, and never has the writ been invoked to discern whether the one who claims valid title has engaged in misconduct, much less *previous* misconduct.

[14] See *Attorney General, ex rel Cook v Burhans*, 304 Mich 108; 7 NW2d 370 (1942) ("The attorney general, . . . by information in the nature of quo warranto, seeks ouster of defendant from the office of regent of the University of Michigan on the ground that he has no legal right to the office and is a mere usurper therein . . . . Defendant having usurped the office of regent, in defiance of the mandate of the constitution barring him under any circumstances from holding such office and rendering all votes cast for him void, it was proper for the attorney general to bring this proceeding in the nature of quo warranto to oust him from such office."); *Layle v Adjutant General*, 384 Mich 638, 642; 186 NW2d 559 (1971), citing *Sobocinski v Quinn*, 330 Mich 386; 47 NW2d 655 (1951) ("[P]laintiff instituted quo warranto proceedings to oust defendant from office[.]").

basis for recommending that this Court impose a sanction for judicial misconduct; rather, the JTC must make independent factual findings in this regard. In *Kapcia*, the Attorney Grievance Commission revoked the respondent's license to practice law. However, shortly thereafter, the respondent was elected as a probate judge. The JTC, citing the revocation of the respondent's law license, argued that the respondent had violated article 6, § 19 of the Michigan Constitution, which requires all judges in this state to have a valid law license.[15] Thus, the JTC concluded that the respondent had vacated his office and had therefore committed judicial misconduct. This Court rejected that argument, stating:

> Manifestly, this contention begs the question; it presupposes that the removal from office which the [JTC] seeks by these proceedings to accomplish has already occurred.
>
> The [JTC]'s presentation proceeds on the erroneous assumption that the [JTC] had no choice once it was established that Judge Kapcia had been suspended from the practice of law but to recommend his removal and that this Court, likewise, has no choice but to remove him; that, indeed there truly is nothing before us to consider because the consideration of whether the professional misconduct charged against Judge Kapcia was proven and what to do about it ended when the order of the Grievance Board became final.
>
> The discipline of judges is confided to the discretion of the [JTC] and this Court under § 30 of art 6. It is left to [a] case-by-case exercise of discretion to decide whether a justice or judge—presumably duly licensed to practice law when he qualified as a justice or a judge—whose conduct results in [the] loss of his right to practice law should be disciplined by removing him from office. [*Kapcia*, 389 Mich at 314.]

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[15] Const 1963, art 6, § 19 states that "justices and judges of courts of record must be persons who are licensed to practice law in this state."

Ultimately, *Kapcia* concluded that the JTC must investigate the facts underlying the Attorney Grievance Commission's decision to suspend the respondent's license in order to determine if judicial misconduct had occurred.

> Thus, had the Commission commenced a proceeding against Judge Kapcia charging him with misconduct based on the acts which gave rise to the State Bar grievance proceedings, the Commission would have been obliged to consider all the circumstances in deciding whether to recommend disciplinary action. The Commission's responsibility in that regard cannot be avoided by viewing the matter as a *fait accompli*. Nor can we, by total reliance on the decision reached in the grievance proceedings, escape our responsibility to exercise an individualized judgment. [*Id*. at 312.]

In holding that the JTC cannot escape its responsibility to "exercise an individualized judgment" based on "all circumstances," to determine what disciplinary action is appropriate, *Kapcia* indirectly observed that the JTC and this Court must possess the authority to examine a judge's misconduct for actions that may also serve as the basis for a quo warranto action. Specifically, *Kapcia* distinguished cases on which the JTC had relied, in which judges had been ousted from office for losing their license to practice law, thereby amounting to a vacation of office, because those cases all involved actions for quo warranto. *Id*. at 313-314. There is simply no reason for this Court to have discussed the proper procedure for pursuing disciplinary actions against the judge in *Kapcia*, while expressly recognizing that other cases for quo warranto have resulted in ousting a judge from office for losing his or her license, if the JTC is not empowered to make recommendations for disciplinary actions, which this Court is then free to

accept or reject, based on conduct that could also form the basis of a quo warranto action.[16]

In contrast to this Court's holding in *Kapcia*, the majority states:

> While this Court could certainly review on appeal the decision made by the Court of Appeals in a quo warranto action, and could determine whether the conduct surrounding respondent's forfeiture of office rose to the level of judicial misconduct warranting judicial discipline, an original proceeding in the Supreme Court is not the appropriate place to determine in the first instance *whether* respondent vacated his office. Rather, the law requires that this question be initiated by the Attorney General and resolved as an initial matter by the Court of Appeals. [*Ante* at 644-645.]

Justice WEAVER's assertion that a quo warranto action is a prerequisite to the JTC's, and this Court's, ability to make determinations that respondent committed misconduct, including specifically the vacation of office, by stating that "an original proceeding in the Supreme Court is not the appropriate place to determine *in the first instance*" that misconduct occurred, is exactly counter to *Kapcia*'s counsel that the JTC's "responsibility in that regard cannot be avoided by viewing the matter as a *fait accompli*." Rather, the JTC must make independent findings of fact that misconduct occurred, irrespective of another entity's findings and conclusions

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[16] Justice WEAVER states that *Kapcia* "does not support" the assertion that "actions for quo warranto may only be brought for 'claims that a public official is *currently* exercising an invalid title to office.' " *Ante* at 643 n 15. However, I do not cite *Kapcia* for such a proposition. Rather, I cite *Kapcia* only for the proposition that the JTC is prohibited from using the findings of another entity as a substitute for engaging in its own factual inquiries. Thus, *Kapcia* is pertinent here by establishing that the JTC cannot simply adopt the Court of Appeals' findings of fact in a quo warranto action as a substitute for making its own independent factual findings regarding judicial misconduct.

regarding the same issue. Therefore, even if the Attorney General had successfully pursued a quo warranto action against respondent during his prior term in office, the JTC would *still* have had to make its own factual findings that respondent vacated his office in a current disciplinary proceeding as a precondition to the conclusion that such a vacation of office constituted judicial misconduct.

Justice WEAVER demonstrates her confusion in this regard by stating:

> By analogy, Const 1963, art 6, § 30(2) provides that this Court may discipline, retire, or remove a judge for conviction of a felony. It could hardly be argued, however, that this Court rather than the circuit court should adjudicate and convict the judge of the felony simply because the unresolved predicate issue arose during the course of a judicial disciplinary proceeding. [*Ante* at 645 n 24.].

This Court does not "convict a judge of [a] felony" simply because the same facts that support the felony are presented "during the course of a judicial disciplinary proceeding." Rather, a disciplinary proceeding against a judge may properly lead to a finding of facts by a preponderance of the evidence that judicial misconduct has occurred, *In re Noecker*, 472 Mich 1, 8; 691 NW2d 440 (2005) (holding that the examiner has "the burden of proving the allegations by a preponderance of the evidence"), which might otherwise constitute a felony if found by the circuit court beyond a reasonable doubt.[17] Justice WEAVER's example of the circuit court

[17] This observation also seems to have led to confusion on Justice WEAVER's part, whereby she notes that "[i]t could hardly be argued, however, that this Court rather than the circuit court should adjudicate and convict the judge of the felony simply because the unresolved predicate issue arose during the course of a judicial disciplinary proceeding." *Ante* at 645 n 24. Once again, despite an express statement to the contrary, in this instance that "this Court does not convict a judge of a

having to find that a felony actually occurred before the JTC can recommend that the judge be removed for committing a felony does not address the issue now before this Court. Article 6, § 30(2) of the Michigan Constitution explicitly allows a sitting judge to be removed from office if he is found guilty of a felony. This is one of several specifically enumerated situations in the constitution that effectively establish a substituted process, i.e., a process allowing the JTC and this Court, to view something as a "*fait accompli*" without requiring an individualized fact-finding process to determine that a judge has engaged in misconduct.[18] *Kapcia*, 389 Mich at 313. Notably, however, an action for quo warranto is not one of the specifically enumerated situations that would allow the JTC to bypass its responsibility to make an "individualized judgment" based on "all the circumstances," which is required before the JTC can recommend that this Court sanction a judge for misconduct.

In sum, Justice WEAVER's failure to recognize the distinction between a quo warranto action and a disciplinary action is of critical importance. She is correct that an action for quo warranto constitutes the "exclu-

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felony," but rather finds "by a preponderance of the evidence that judicial misconduct has occurred," Justice WEAVER directly misrepresents the proposition being asserted. See also note 8, *supra*. Neither this Court nor the JTC can convict a judge of a felony. However, the JTC can consider, as a basis for recommending that a judge be sanctioned, the underlying actions that constitute judicial misconduct. For example, a judge who assaults another person, but who is not ultimately convicted for one of any number of reasons unrelated to his culpability, may still be subject to a JTC disciplinary action on the basis of such conduct. Does Justice WEAVER truly disagree with this same proposition? Does she believe that a judge under these circumstances would be immune from a JTC disciplinary action?

[18] See *Kapcia*, 389 Mich at 313, for a listing of these specifically enumerated situations.

sive method for trying title to office," *Gildemeister v Lindsay*, 212 Mich 299, 303; 180 NW 633 (1920), but the exclusive nature of such an action would exist in regard to a judge only if no judicial misconduct was involved. Where a judge's actions constitute misconduct *and* a vacation of office, *both* an action for quo warranto, initiated by the Attorney General, and a disciplinary proceeding, initiated by the JTC, may be pursued. Here, the JTC has initiated a disciplinary action based on respondent's misconduct which, as a result of his intervening reelection in November 2008, now pertains to respondent's *previous* term in office, which in turn means an action for quo warranto is no longer apposite. Further, unlike an action for quo warranto, a disciplinary action initiated by the JTC can address a judge's misconduct that occurred before his current term in office, MCR 9.205(B)(2), and may result in an appropriate sanction short of removal from office, MCR 9.205(B). Because an action for quo warranto cannot lie where the term of office for which the title being contested has expired, *Layle*, 384 Mich at 642,[19] which

[19] Indeed, if the Attorney General pursues a proper action for quo warranto, but, before that claim is resolved, the judge wins a subsequent reelection, the action becomes moot and must be dismissed. As we stated in *Layle*, 384 Mich at 645:

> Even if the office has not been abolished, proceedings to try title to a public office cannot be brought after the term has expired, or even if it is so nearly expired that the inquiry would be of no effect. *Osterhous ex rel Vander Veen v Van Duren*, 168 Mich 464; 134 NW 456 (1912). The writ generally will not lie to try the abstract title to an office.

Although such a result initially may seem anomalous, the fact that a quo warranto action cannot survive without an ongoing dispute regarding an individual's title to office simply emphasizes the point that an action for quo warranto is of a fundamentally different nature than a disciplinary action initiated by the JTC. Whereas an action for quo warranto is only viable so long as there remains a current dispute regarding a judge's title to office, a

as Justice WEAVER correctly notes is exactly the situation now before this Court because of respondent's reelection in 2008, the *only* avenue available to address his past conduct is the very type of disciplinary proceeding that the JTC has initiated here. As a consequence, this Court *does* possess the authority, derived from the constitution, to sanction respondent for his misconduct, based on the JTC's findings of misconduct and recommendation for discipline.[20]

Finally, Justice WEAVER's misunderstanding of quo warranto would generate several notable consequences. As an initial matter, Justice WEAVER concludes that the JTC is precluded from bringing a disciplinary action against respondent in the absence of an action for quo warranto. That is, this Court would not be entitled to accept the JTC's recommendation for disciplinary action based on a judge's misconduct that also called into

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disciplinary action arising from misconduct that undermined one's title to office remains available after the title dispute has been resolved or rendered moot.

[20] Justice WEAVER claims that my argument "conflates the complaint of vacation of office with the other complaints concerning inappropriate sexual conduct." *Ante* at 639 n 9. As with several of her other arguments, see notes 9 and 16 of this opinion, this has utterly no basis in the actual language of this opinion. As should be quite clear to the ordinary reader, the discussion of quo warranto in this opinion is only relevant to whether respondent can be sanctioned for his "misconduct" of vacating the district from which he was elected. By its very terms, the discussion of quo warranto has no relevance to any other alleged incident of misconduct in this case.

The lack of regard for precision in language is further reflected in Justice WEAVER's characterization that I describe her rejection of the JTC's recommendations as "unbelievable," *ante* at 646, a word I use only in an entirely different context with reference to certain actions of the *respondent*. *Infra* at 694. My *actual* analysis of Justice WEAVER's opinion is that it is legally and constitutionally unsound, confused in its understanding of the record, and unconcerned by logical consequences, not that it is "unbelievable."

question even his *current* title for office if the Attorney General, an independent executive-branch officer, was unwilling for any reason to pursue an action for quo warranto. This, in my judgment, is a significant limitation upon the JTC's, and this Court's, constitutional prerogatives that is nowhere found within article 6, § 30(2). Equally important, such a result would undermine the very purpose of this constitutional provision, i.e., to foster public confidence in the integrity of the judiciary.

Additionally, Justice WEAVER would apparently extend her novel quo warranto analysis to judicial misconduct that alternatively gives rise to a potential felony charge. By doing this, she would prohibit the JTC from recommending disciplinary action against a judge based on the underlying actions for such a charge unless there was a formal felony conviction. This remarkable proposition would allow judges in this state to commit criminal behavior for which the JTC would have no authority to address. Under Justice WEAVER's misapprehension of the JTC's constitutional authority, the underlying conduct forming a felony charge, whether assault, theft, arson, or fraud, could not then form the basis for a finding of judicial "misconduct in office," because it is only "when [a trial] court process legally determines a judge is guilty of [a felony]" that the JTC can then "bring a proceeding for judicial misconduct," based on the facts necessary to support that conviction. *Ante* at 648.[21] Justice

[21] The extent to which Justice WEAVER would apply her analysis to other contexts such as when a judge engages in acts that could form the basis of a misdemeanor conviction, or even a civil penalty, imposed by a trial court or administrative agency, is unclear. That such circumstances may not be involved in the instant case does not, of course, make it any less irresponsible to propose a new constraint upon the JTC and leave open to question the extent to which this constraint will be carried out to its logical ends. Almost certainly, if Justice WEAVER's unprecedented understanding of the JTC's authority was to prevail, it would ensure that judges subject to JTC discipline routinely raise the "Weaver-defense,"

WEAVER's arguments find absolutely no support in the law or constitution of this state.[22]

In sum, the existence of an action for quo warranto does not prevent the JTC from assessing respondent's misconduct, regardless of whether that conduct happens to involve the improper exercise of a title to office. Once that assessment has taken place and a recommendation made, as here, this Court is fully authorized to consider that recommendation, and I would do so.

III. EXAMINER'S CONDUCT

As previously noted, the JTC's examiner visited respondent's chambers and demanded that he resign from his position. I concur with the facts in this regard as set forth by the majority, and agree that, at present, "the proper forum for the review of the JTC director's actions is the Attorney Grievance Commission." *Ante* at 650.

I do disagree, however, with the majority's implication that the tactics engaged in by the examiner,

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i.e., that their conduct fell beyond the scope of the JTC's authority, at least until a trial court or administrative body had "in the first instance" rendered a decision.

For what it is worth, Justice WEAVER's theory also contradicts her own dissenting opinion in *In re Gilbert*, 469 Mich 1224, 1234 (2003), cf. note 2 of this opinion, in which she opined that "judicial disciplinary proceedings are neither criminal nor quasi-criminal in nature." In *Gilbert*, Justice WEAVER criticized the majority for not imposing a more severe sanction on Judge Thomas Gilbert for smoking marijuana, *id*.—an action for which Judge Gilbert could have been, but was not, criminally convicted.

[22] Also of concern is whether, under Justice WEAVER's theories, the JTC and this Court would be *bound* by the factual and legal findings of trial courts and administrative agencies in cases of judicial misconduct. This Court in *Kapcia* conclusively answered this question in the negative, but this is precisely what Justice WEAVER suggests is required of the JTC and this Court.

even if they eventually prove to have been wrongful or inappropriate, have any particular relevance to the matter now before us. This Court cannot, as a function of the examiner's behavior, avoid its responsibility to address respondent's misconduct. To do so would be tantamount to adopting, in the context of judicial discipline, some variant of the "exclusionary rule," which requires "the exclusion of reliable evidence when the constable blunders." *Stone v Powell*, 428 US 465, 496; 96 S Ct 3037; 49 L Ed 2d 1067 (1976). Here, there is no claim that the examiner obtained any evidence in this case by unlawful means. Moreover, if we were to allow the examiner's troubling behavior to influence our evaluation of respondent's misconduct by failing to impose a sanction based solely on respondent's misconduct, our decision would be contrary to MCR 9.200, which states:

> An independent and honorable judiciary being indispensable to justice in our society, subchapter 9.200 shall be construed to preserve the integrity of the judicial system, to enhance public confidence in that system, and to protect the public, the courts, and the rights of the judges who are governed by these rules in the most expeditious manner that is practicable and fair.

In sum, disregarding a judge's misconduct out of disdain for the examiner's behavior is not a rational response designed to "preserve the integrity of the judicial system," nor does it "enhance public confidence in that system." Thus, in keeping with this Court's responsibility to uphold the integrity of the judiciary, the Court should determine an appropriate sanction based solely on respondent's misconduct, irrespective of the examiner's conduct, which remains the subject of administrative consideration at this time.

IV. STANDARD OF REVIEW

This Court reviews the JTC's factual findings and disciplinary recommendations de novo. *Noecker*, 472 Mich at 8.[23] "The JTC's finding of misconduct must be supported by a preponderance of the evidence." *In re Haley*, 476 Mich 180, 189; 720 NW2d 246 (2006). However, "[a]lthough we review the JTC's recommendations de novo, this Court generally will defer to the JTC's recommendations when they are adequately supported." *Id*. See also *In re Chrzanowski*, 465 Mich 468, 488; 636 NW2d 785 (2001); *Brown*, 461 Mich at 1293.

V. RESPONDENT'S CONDUCT

A. VIOLATING LAW AND CONSTITUTION

The JTC has issued a decision and recommendation for discipline in this case concluding, among other things, that respondent moved outside the division from which he was elected in violation of article 6, § 20 of the constitution and that he was not a registered elector of the division from which he was elected, as required by MCL 600.8201. According to the JTC, these are violations of the law and constitution that also constitute judicial misconduct sanctionable under Canons 1 and 2 of the Code of Judicial Conduct and article 6, §§ 20 and 30(2) of the constitution.[24] I agree.

Article 6, § 20 of the Michigan Constitution states:

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[23] "[I]t is the JTC's, not the master's, conclusions and recommendations that are ultimately subject to review by this Court." *Chrzanowski*, 465 Mich at 481.

[24] Code of Judicial Conduct, Canon 1 states in part:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the

> Whenever a justice or judge removes his domicile beyond the limits of the territory from which he was elected or appointed, he shall have vacated his office.

The "territory from which he was elected" necessarily means the geographic location from which respondent received the requisite number of votes to obtain his judicial office, i.e., the 1st Division of the 63rd District Court.[25] Additionally, "domicile" is defined as "[t]hat place where a man has his true, fixed, and permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning." Black's Law Dictionary (5th ed). A domicile is "that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time."

> judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary.

[25] Respondent argues:

> The territory from which he was elected is the 63rd District. This is one district, with two divisions. MCL 600.8130(4). The fact that it has two divisions does not make it two districts. In fact, the legislature, in creating divisions of a district court, explicitly stated, "The provision for election divisions of a judicial district have no effect on the administration of a judicial district." MCL 600.8102. [Respondent]'s residence at 201 Honey Creek Drive in Ada is undeniably within the 63rd District. He has always maintained his principal residence in one of the divisions of the 63rd District.

Contrary to this argument, respondent does not dispute that he was elected exclusively from votes cast within the 1st *Division*. Therefore, it is the 1st Division that constitutes the "territory from which he was elected," not the 63rd District. Indeed, as stated by the JTC:

> The sincerity of respondent's proposed broad interpretation of the provision is called into question by his explanation at the hearing that he believed he had to be domiciled within the 1st Division [only] when he was "running" for re-election.

Henry v Henry, 362 Mich 85, 101-102; 106 NW2d 570 (1960) (citation and quotation marks omitted). "One cannot be permanently located in more than one place; one cannot be domiciled in more than 1 place; one cannot intend to remain for an extended period of time in more than 1 place." *In re Scheyer's Estate*, 336 Mich 645, 651-652; 59 NW2d 33 (1953). "Generally, the determination of domicile is a question of fact. However, where, as here, the underlying facts are not in dispute, domicile is a question of law for the court." *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364; 656 NW2d 856 (2002).

Further, MCL 600.8201 requires that "a candidate for and a judge of the district court shall be licensed to practice law in this state and shall be a registered elector of the district and election division in which he seeks to hold office."

During the master's hearing, respondent testified to the following facts regarding his domicile between 2000 and 2008, which the JTC used in rendering its decision. Respondent stated that from 1984 until 2000 he owned a house on South Monroe Street, within the 1st Division, where he purportedly lived until 1999. In 1998, he purchased a home on 201 Honey Creek Avenue in Ada Township, an area outside the 1st Division from which he was elected. He claimed that he was not domiciled there until 2005. Respondent testified that the year after he bought the property at 201 Honey Creek, he sold the Monroe Property because he "needed the money," and then moved to his sister's house at 260 Oak Street, within the 1st Division, "where I was basically a tenant, and that was in 2000." More specifically, respondent stated,"[W]hen I bought 201 Honey Creek, that was a lot of money for me, and that's why I sold the [Monroe Property] and moved to my sister's

house [at 260 Oak Street], who was kind enough not to charge me any rent[.]" Respondent changed his license and voter registration to reflect this move. He claimed that he maintained this living arrangement until 2002, when he began renting an apartment located on Thirteen Mile, which was also in the 1st Division. Respondent again changed both his driver's license and voting address to his Thirteen Mile property. However, during this time, respondent admits that he spent a "significant" amount of time at 201 Honey Creek and slept there "a lot." In other words, respondent testified that he sold his primary residence in 1999 so he could fix up 201 Honey Creek and live with his sister at no cost until 2002, when he began living at Thirteen Mile.

In 2002, respondent purchased another property, 109 Honey Creek, and then purchased yet another property on Belding Road, which is within the 1st Division, and as to which he testified, "I bought that in June of, I think 2003, and I didn't move there until early 2004. And I lived at [Thirteen Mile] until I moved in, but it wasn't when I bought it."[26] Respondent changed his voter registration on March 11, 2004, and his driver's license on March 23, 2004, to the Belding Road address. However, he registered his mailing address with the Secretary of State as being the address of the 1st Division courthouse. In regard to the period immediately following respondent's purchase of 109 Honey Creek, he testified to the following:

> That house [109 Honey Creek] I had to get done because there was a person that wanted to buy it, and so I was down

[26] Respondent testified that his daughter contributed to purchasing the Belding Road property as an investment but that she never lived there. Additionally, respondent testified that the property was actually an "investment for [him] also, but it's [his] — the place where [he] was living at the time."

> there a lot and I worked late into the night, and a number of times I just went up and slept at 201 [Honey Creek]. If I didn't work that late, I went back to the Bostwick Lake, Belding Road address.

Respondent stated that Belding Road continued to be his domicile until December, 5 2005, when he moved to 201 Honey Creek, which was further confirmed by his filing of a homestead exemption for 201 Honey Creek in 2006. However, despite admitting that he was domiciled at 201 Honey Creek after 2005, respondent testified that, in 2007, he (a) voted within the 1st Division using his Belding Road address,[27] (b) applied for a concealed weapons permit on February 7, 2007, using his Belding Road address,[28] (c) never changed his voter registration to 201 Honey Creek,[29] and (d) never changed his driver's license to the 201 Honey Creek address.[30] He also admitted knowing that he had to change his voter registration and driver's license, and, despite consistently doing so during every move from 2000 to 2005, he failed to do so once he moved to 201 Honey Creek.

From this testimony, respondent expressly admits to moving outside the 1st Division to 201 Honey Creek as of 2005. He also admits that he intended for that location to be his domicile. Both of these admissions are reflected in the master's and the JTC's findings of fact.

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[27] The examiner asked respondent: "And [after moving to 201 Honey Creek] you actually voted using your Belding address while you were living in Honey Creek; is that right?" Respondent answered: "Yes."

[28] The examiner asked respondent in regard to his February 7, 2007 concealed weapon permit: "And on that application, you list your Belding address as your primary residence; is that correct?" Respondent answered: "That's correct."

[29] The examiner asked respondent: "You didn't change your voter registration to [201 Honey Creek]; right?" Respondent answered: "No."

[30] The examiner asked respondent: "You didn't change your driver's record or information with the Secretary of State [to 201 Honey Creek] either, did you?" Respondent answered: "No."

These admissions *alone* are sufficient to demonstrate that respondent moved outside of "the territory from which he was elected," which is a violation of article 6, § 20 of the constitution. Similarly, the fact that respondent moved outside of the 1st Division made him ineligible to be "a registered elector" of that division, regardless of the fact that respondent improperly voted in that division after 2005 in violation of MCL 600.8201. Thus, respondent failed to comply with article 6, § 20 of the constitution and MCL 600.8201, which is also violative of Canon 2(B) of the Code of Judicial Conduct's requirement that a judge "observe the law," and as a result Canon 1's requirement that a judge maintain the "integrity" of the judiciary." Additionally, respondent's conduct runs afoul of MCR 9.104:

> (A) The following acts or omissions by an attorney,[31] individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> * * *
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach[.]

There can be no question that a judge's failure to obey the law, which he has taken an oath to uphold, "exposes the legal profession [and] the courts to obloquy, contempt, censure, or reproach."

B. BREACHING FAITH

Beyond acting in dereliction of the law, respondent in a very fundamental sense has broken the bonds with

[31] Because all elected judges within this state must be licensed attorneys, the court rules governing attorney conduct apply with equal force to judges.

the people of his district. By his own acknowledgement, he has knowingly departed from their political community to become part of another political community. While there may well be some artificiality to these political communities, and while the economic, social and cultural circumstances of the 2nd Division may not be markedly different from those of the 1st Division, our system of republican government nonetheless is predicated upon the idea that the "we the people" are entitled, and are obligated, to assert their control over the actions of government through the selection of local representatives. By this process, the people communicate their views concerning the kind of leadership they desire from their public institutions. Particularly in the case of the selection of judges—persons who do not ordinarily make public policy, and who cannot be considered "representative" officers in the same sense as persons elected to the legislative and executive branches of government[32]—there must be some further

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[32] See, e.g., *People ex rel Royce v Goodwin*, 22 Mich 496, 499-500 (1871):

> When we consider the nature of [judges'] functions, their independence of local affairs becomes still more apparent. Judges differ from all other public servants in having no representative duties. The judicial department of every civilized government is one of the three co-ordinate parts of the sovereignty which acts for the state in expounding the laws and enactments in which the other departments have acted for the people as legislators and the approvers of legislation. It represents only the law by which the people have, by their proper agents, bound themselves. It cannot, therefore, in any of its duties, be said to serve any county, or circuit, or district. Its services are all performed on behalf of the state, as the sovereignty from which all the law emanates . . . . [T]he only object of having local courts is to bring justice home to the people, but not to have cases decided as the desire of the people might shape the decision.

That is, judges are presumed to speak, not on behalf of their constituencies, or on behalf of particular concerns within their constituencies, but only to represent the interests of the law, to speak for the rule of law. This is one reason why the Framers of the United States Constitution did not see the need to provide for the popular election of judges as they did for

rationale for why all judges of our state, with the exception of Supreme Court justices, are elected by "districts" or "circuits." See Const 1963, art 6, §§ 8, 11, and 16.[33]

At least part of this explanation must certainly be that the people are entitled to select as their judges persons whose sense of values, whose judgment, whose life experiences, are in some sense a function of their roots within that community, persons who have shared in some tangible way the day-to-day trials and tribulations, and influences, of citizens within that community. Although the shared experiences of persons within the 1st and 2nd divisions may not be as dissimilar as those between more geographically far-flung communities, it is nevertheless an outgrowth of our respect for the integrity of local government, and specifically the people's right and obligation to engage in local self-government, that we must take seriously the matter of a public official who has breached the faith with his community that is required by our constitution by departing from it.

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members of Congress and the President. The people of Michigan have made a different judgment in their constitution.

[33] In addition to the constitutional provisions applicable to this analysis, the Legislature has enacted MCL 168.467f(1), which makes clear that district court judges must also be elected from their respective divisions or districts. MCL 168.467f(1) states:

> Except as otherwise provided in this section, judges of the district court shall be elected in each judicial district and election division of a judicial district at the general election to fill vacancies in office[.]

Thus, regardless of the rationale for *why* the people have chosen to require that district court judges be elected from the district and division in which they will serve, the people have unmistakably decided that such a requirement should exist, and that decision must be respected by the JTC and this Court.

In sum, respondent's acknowledgement that he moved outside of the 1st Division after 2005 effectively acknowledged both a violation of the law and constitution, and a breach of faith with the people of his community, both of which threaten "public confidence in the . . . integrity of the judiciary," Canon 2(B), and risk "expos[ing] the courts to obloquy, contempt, censure, or reproach," MCR 9.104(A)(2). Thus, I agree with the JTC that respondent's vacation of his electoral district constitutes judicial misconduct and warrants an imposition of sanctions.

C. FALSE TESTIMONY

In addition to the period *after* 2005, during which respondent acknowledged moving from, and living outside, the 1st Division, the JTC determined, on the basis of telephone logs produced during the master's hearing, that respondent had, in fact, moved outside of his electoral district in 2000, rather than 2005. Specifically, these logs indicated that from 2000 to 2004, respondent provided his 201 Honey Creek telephone number as his exclusive after-hours contact for where he could be reached when police officers needed him to make "probable cause" determinations and issue warrants. Because of a medical situation, respondent was not required to be on call from June 2004 until sometime in 2005 and, thus, he did not provide an after-hours contact number during that period. Once respondent resumed this responsibility in 2005, he briefly provided the telephone number for the Belding Road property in the 1st Division. However, calls to the Belding Road address were forwarded to 201 Honey Creek.[34] From the

[34] It appears that respondent provided his Belding Road telephone number in response to a visit from the State Court Administrative Office. During this visit, respondent was informed that he was in

beginning of 2006 until June of that year, he again provided only his 201 Honey Creek telephone number, and from June 2006 until the beginning of 2007, respondent provided his Belding Road telephone number with calls again forwarded to 201 Honey Creek. In 2007, respondent resumed providing only his 201 Honey Creek telephone number.

From these logs, the JTC concluded that respondent's consistent listing of 201 Honey Creek as his contact information from 2000 to 2008 showed that he, in fact, lived at 201 Honey Creek beginning in 2000 rather than 2005. On that basis, the JTC concluded that respondent's assertion that he had not moved outside his district before 2005 evidenced a "lack of candor and honesty," which amounted to "false testimony" regarding his residence during this period.

Although "this Court will generally defer to the JTC's recommendations when they are adequately supported," *In re Haley*, 476 Mich at 189, the JTC's use of these telephone logs is not without its difficulties. Of particular concern is the examiner's failure to produce these logs in accordance with the master's discovery order. More specifically, the examiner did not make respondent aware that he was in possession of, and intended to use, these logs until respondent was actually testifying during the master's hearing. Once the examiner began questioning respondent about these documents, respondent's counsel objected that the examiner had not produced these logs and that the master should not allow them to be used for substantive

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violation of his responsibility to remain domiciled within the division from which he was elected. It was immediately after this visit that respondent temporarily changed his after-hours contact information to the Belding Road property, with calls forwarded to his home at 201 Honey Creek.

purposes. Agreeing with respondent, the master ruled that these documents could only be used to impeach respondent.

However, during these hearings, the examiner called Donna Gillson—an employee of the 63rd District Court and an acquaintance of respondent—to testify, and, on the basis of her personal knowledge, she independently established that respondent had provided her with all the numbers contained in the telephone logs. She also testified that the only reason respondent changed his after-hours telephone contact information to the Belding Road address in 2006 was because the State Court Administrative Office (SCAO) had threatened to notify the JTC that he was living outside of the 1st Division.[35]

[35] It is also worth noting that, although respondent now admits that he moved outside the 1st Division *after 2005*, it seems likely that he only made this admission based on filing a homestead exemption form in 2006 that listed 201 Honey Creek as his primary residence as of 2005, which made it impossible for him to continue denying that this was his home once he discovered that the JTC was aware of this filing. More specifically, when respondent was confronted by SCAO officials in 2006 about living outside his district, he initially denied living at 201 Honey Creek. When these officials asserted he was not living inside his district, respondent replied, "I am too." Shortly thereafter, respondent began having his calls directed to the Belding Road property with calls forwarded to 201 Honey Creek. He also voted in a countywide election in 2007 using his *Belding Road* address. The inference that respondent originally attempted to continue misleading SCAO about where he lived *after* 2005 is further supported by the fact that on February 1, 2007, respondent filled out an application to renew his concealed weapon permit and, in that application, also listed the Belding Road property as his actual residence. The majority, rather than viewing this as additional evidence that respondent was engaging in "a deliberate attempt to deceive officials about his change of address," *ante* at 652 n 30, claims that "the failure to change his address was simply an oversight: respondent did not think to read the form and make any corrections, as he admitted that he did not read the form . . . ." The majority's willingness to ignore this "oversight" is especially troubling in view of the fact that the form, which respondent was required to read during his testimony, specifically stated, "I understand that this application is executed under

Ms. Gillson then stated that respondent had his calls forwarded from the Belding Road property to 201 Honey Creek. Significantly, she explained that the reason respondent changed his telephone number back to 201 Honey Creek in 2006 was because his call-forwarding made it impossible for him to receive faxes at his home at 201 Honey Creek. This testimony also lends credence to the JTC's finding that respondent provided false testimony because the examiner asked respondent if he "ever had [his] calls forwarded from

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oath and swear or affirm under penalty of law the above answers are true and correct to the best of my knowledge. I understand that intentionally making a false statement on the application is a felony punishable by imprisonment of not more than four years or a fine of not more than $2,500 or both." Given that respondent's signature verifies that he signed this form "under oath" and subject to "penalty of law," the majority's attempt to make light of this falsehood simply because "[a]ll he had to do was sign the permit," *ante* at 652 n 30, is entirely unpersuasive.

The majority's minimization of respondent's responsibility for reading a sworn document that he signed seems inconsistent with *Rowady v K Mart Corp*, 170 Mich App 54, 60; 428 NW2d 22 (1988), in which then-Judge WEAVER joined an opinion stating, "Nor is plaintiff's failure to read the entire agreement before signing it relevant. *It is well established that a person cannot avoid a written contract on the ground that he did not attend to its terms, did not read it, supposed it was different in its terms, or that he believed it to be a matter of mere form*." (Emphasis added.) This basic proposition has been settled in our caselaw for over a century. See, e.g., *Rory v Continental Ins Co*, 473 Mich 457, 489 n 82; 703 NW2d 23 (2005). For reasons she does not explain, Justice WEAVER requires less personal responsibility of an experienced judge to read, understand, and take seriously a legal document to which he swears under oath than she requires of all other citizens of this state with regard to their own written contracts.

That respondent provided a false address two years after he allegedly moved to 201 Honey Creek, strongly suggests that respondent would have continued with his "deliberate effort to deceive officials" about his true address. Yet, rather than sanctioning respondent for his conduct, the majority repeatedly makes excuses on his behalf. I look forward to the majority being similarly empathetic when criminal and civil appellants who are not judges raise the "all I had to do was sign the permit" defense.

one home address to another[.]" In contrast to Ms. Gillson's testimony, respondent replied, "No, not that I know of."

The following day, respondent was again called to testify. During this testimony, respondent stated that he had reviewed the logs. The examiner then went through each number contained in the logs and respondent verified that all the telephone numbers contained therein belonged to him during the listed times. Further, after the JTC rendered its decision, which was based substantially on the logs, respondent challenged the use of those documents in this Court. However, in doing so, respondent made the following statement in his brief:

> Assuming, arguendo, that the duty logs presented were accurate copies of the ones that were created in the ordinary course of business, it should come as no surprise that [respondent] listed a phone number at 201 Honey Creek a place where he could be found when not on the bench. As [respondent] testified, he spent a significant amount of his free time renovating two homes on Honey Creek.

Thus, although respondent's challenge to the JTC's use of the telephone logs is framed in "arguendo" terms, he notably does not contest the *validity* of these logs, and indeed admits that it should "come as no surprise" that he listed the 201 Honey Creek number for where he could be contacted after hours.

Because Ms. Gillson testified from her own personal knowledge about the after-hours telephone numbers that respondent had provided, and because respondent later verified all these numbers, respondent can hardly question in good faith the information in the logs that contributed to the JTC's conclusion that respondent had provided false testimony when claiming that he did

not move outside of his district before 2005. Thus, despite the examiner's failure to properly produce the telephone logs before the hearing, the information contained in those records nonetheless affords an altogether proper basis from which the JTC could conclude that respondent's testimony was not truthful.

Further, as the examiner initially stated, the logs were intended to impeach respondent in regard to his testimony that he had not moved outside the 1st division before 2005. Although respondent's relocation constituted part of the substantive claim levied against him during the disciplinary proceeding, this same information is also relevant to ascertaining his credibility and, in service of the latter purpose, suggests strongly that respondent was not being truthful, the primary purpose for which the logs were employed. Accordingly, the JTC properly evaluated these documents in determining that respondent had provided false testimony.

The JTC's conclusion that respondent moved outside the 1st division before 2005 is further supported by Ms. Gillson's testimony that she delivered campaign materials to 201 Honey Creek, where respondent was apparently planning his 2002 reelection campaign.[36] Ms. Gillson stated that she had dropped respondent off at 201 Honey Creek on a number of occasions before 2005,

[36] Respondent also admitted that before 2002 he "intended to live [at 201 Honey Creek]. And, frankly, that's why I was working on that. I wasn't working on that to resell it." Although, this statement could be viewed as evidencing respondent's intent to live at 201 Honey Creek at some later date, such an interpretation is substantially undermined by the "significant" amount of time he spent there from 2000 until 2008. It would be disingenuous for respondent, despite admitting to being present at 201 Honey Creek on so frequent a basis, while simultaneously providing an exclusive after-hours contact number at that same address during this time, to now claim that his intention to be domiciled there was directed toward some future date.

and that she thought it was "fairly well known to everyone where he lives."[37] Because "one cannot be domiciled in more than 1 place, one cannot intend to remain for an extended period of time in more than 1 place," *Scheyer's Estate*, 336 Mich at 651-652, respondent's actions, especially in light of the information he provided to the district court concerning his exclusive after-hours contact number at 201 Honey Creek from 2000 to 2004, indicate that for an "extended period of time" (2000-2004), he intended to remain at 201 Honey Creek. Thus, respondent was domiciled outside of the 1st division before 2005, and his testimony to the contrary was not truthful.

Given this evidence, both circumstantial and direct, it is puzzling how the majority, after "[h]aving reviewed the entire record closely," can now assert that it does "not conclude that respondent lied under oath," and that it "agree[s] with respondent's counsel that this is not a case of arrogance," but one of confusion.[38] *Ante* at 652-654. Specifically, the majority asserts that respondent once more was "confused and could not remember a series of different telephone numbers (un-

[37] During a 2004 incident in which police were summoned to 201 Honey Creek, the officers observed that respondent's pet cat was present at the property.

[38] To the extent that Justice WEAVER believes respondent was "confused" about what the law required of him, i.e., respondent "thought he could live [outside his] division as long as he was not running for reelection," *ante* at 653, this argument is belied by the record. First, there is no statute or caselaw that even hints at such a proposition, and neither Justice WEAVER nor respondent has called anything relevant in this regard to the attention of this Court. Second, and more importantly, respondent's prolonged efforts to hide his living arrangement pre- and post-2005 undermine the credibility of any claim that respondent genuinely believed he could live outside his district so long as he was not currently "running" for reelection. If respondent genuinely believed this, there would have been little need to engage in such an extensive effort to avoid having his residency detected.

til he later refreshed his recollection), specific dates and times, and events that occurred nearly 10 years before he testified." *Ante* at 653-654. By suggesting that respondent was "confused" when the examiner initially confronted him with the telephone logs, the majority leaves unanswered why this initial confusion had any impact on respondent's *second* day of testimony, i.e., the day *after* he was presented with the telephone logs, especially after respondent admitted that he had reviewed those logs by that time and had confirmed that the numbers contained therein belonged to him. Indeed, the majority seems to recognize that respondent was *not* confused regarding the telephone logs at that point by stating that he was only confused "until he later refreshed his recollection . . . ." *Ante* at 653. Nor does the majority so much as attempt to explain how Ms. Gillson's testimony, which directly refutes respondent's claim that he did not live outside of his division prior to 2005, bears any relation to respondent's alleged "confusion" concerning pertinent facts as to the telephone logs. Specifically, the majority overlooks completely Ms. Gillson's testimony that respondent began forwarding his calls to 201 Honey Creek in the first place as part of a deliberate effort to avoid detection by the JTC.

Additionally, by stating that "respondent did not try to deny the fact that he was living in the 2nd Division at that time, because he thought he could live in that division as long as he was not running for reelection," *ante* at 653, the majority implies that respondent was also confused as to whether he could live outside his district. By suggesting that respondent was "confused" in this regard, the majority misunderstands what is at issue. Respondent's false testimony pertains to his assertions that he did not live outside the district from which he was elected before 2005 when, in fact,

the evidence shows that he did. That is, respondent's lack of candor has little to do with what the law did or did not require of him.

Perhaps most troubling is the majority's willingness to overlook respondent's lack of candor as being due to his alleged "confusion," when the very nature of his judicial responsibilities include properly ascertaining facts, ensuring accuracy in testimony, and correcting inaccuracies that may arise during fact-finding proceedings. Significantly, respondent had the opportunity to do exactly that when he appealed to this Court, but, instead, he stated that "it should come as no surprise that [he] listed a telephone number at 201 Honey Creek, a place where he could be found when not on the bench," since "he spent a significant amount of his free time" there. Thus, rather than supporting the majority's assertion that respondent was confused, his own statements to this Court suggest strongly to the contrary that he was *not* confused. Indeed, it is unbelievable that a judge of respondent's experience would allow any initial confusion that may have caused the JTC to conclude that he lied under oath to persist and to go uncorrected in his appeal to this Court. Finally, regardless of the majority's claim that respondent was "confused" regarding telephone numbers, dates and times, and prior events, *ante* at 653-654, Ms. Gillson was not, and the substance of her testimony was clear, powerful, and damaging to respondent's credibility.

Therefore, apparently on the sole grounds of respondent's alleged "confusion," and with almost no explanation of how it reaches its result, the majority summarily concludes that respondent has neither violated the Michigan Constitution nor provided false testimony under oath. In this process, the majority gives no credence to the following evidence, and thereby utters not a hint of disapproval, and avoids any sanction, for behavior that

calls into question the fundamental integrity of our judiciary: (a) respondent's nearly 10 years of continuously spending "significant" periods of his after-hours time at 201 Honey Creek; (b) respondent's admission that before 2002 he "intended to live at 201 Honey Creek," which is why he was "working on [the property]"; (c) Ms. Gillson's unequivocal statement that it is "fairly well known to everyone where [respondent] lived"; (d) the fact that respondent's pet cat was living at 201 Honey Creek before 2005, as noted in a police report stemming from a 2004 incident; (e) the telephone logs directing police officers to reach respondent at 201 Honey Creek as his *sole* after-hours contact *before* 2005; (f) Ms. Gillson's testimony verifying the information in the telephone logs that respondent's sole after-hours contact before 2005 was 201 Honey Creek; (g) the fact that respondent actually ran his 2002 reelection campaign from 201 Honey Creek; (h) Ms. Gillson's testimony that, shortly after respondent was confronted by SCAO and accused of vacating his office by living outside his district, he purposefully misled SCAO regarding his true residency by manipulating his telephone lines through call forwarding; (i) the telephone logs that support Ms. Gillson's testimony that respondent attempted to avoid having his true residence being detected by forwarding his telephone calls; (j) respondent's untruthful answer in response to whether these telephone logs were ever forwarded from his home in the 1st division to 201 Honey Creek of "[n]o, not that I know of," as if he were unaware of how his own telephone calls were being directed; (k) respondent's initial false statement that "I am too [living in the proper district]" in 2006, despite afterwards admitting that he lived outside his district as of 2005 and thereafter when he was confronted by two SCAO officials who alleged that he had moved outside of his district; (l) respondent's false address that was provided when applying for a gun permit that he stated was

true "under oath" and "under penalty of law;" and (m) the master's finding, after personally taking respondent's testimony, that he was "less than truthful" in this testimony, and the JTC's unanimous conclusion that respondent was "lacking in candor" in this same testimony.

In sum, because respondent's testimony and actions demonstrate that he was domiciled at 201 Honey Creek before 2005, I agree with the JTC that respondent was not being truthful when giving his sworn testimony. Thus, respondent's constitutional and statutory violations were of longer duration than he admitted—effectively constituting a "pattern and practice" of misconduct—which necessarily means, as the JTC concluded, that he showed "a lack of candor and honesty," which amounted to providing "false testimony" before the master. In addition to vacating his electoral district before and after 2005, this lack of candor independently justifies the imposition of sanctions.

D. OTHER MISCONDUCT

The remaining allegation of judicial misconduct concerns respondent's inappropriate conduct directed toward female court employees. The JTC found that respondent engaged in three distinct acts of misconduct. In the first instance, he drew female breasts on a note that was attached to a court file. The drawing was made after a female clerk commented on the revealing dress of a woman who appeared in court. The second event concerned the drawing of a penis on a note that was attached to a court file. The third instance occurred during a retirement party for an employee at the 2nd Division courthouse. While at the party, respondent commented on a university sweatshirt worn by a female clerk employed in the 2nd Division. Respondent stated that the woman had "an awfully small chest" for the

college indicated on the sweatshirt, and "should have gone to a smaller school like Alma," which would have fit her "small chest better."

Respondent's counsel acknowledged that respondent's conduct was "inappropriate," but contended that it was spontaneous and represented "isolated" incidents from respondent's 36-year career. I agree with counsel, and believe that respondent's conduct warrants, at most, a public censure, consistent with the recommendations of the JTC, and the conclusions of the majority.

VI. *BROWN* FACTORS

In *In re Haley*, 476 Mich at 195, this Court stated:

> When determining the appropriate sanction, this Court seeks not to punish the judge, but to maintain the integrity of the judicial process and protect the citizenry from corruption and abuse.

Based on respondent's conduct, the JTC has recommended that respondent be removed from office, a recommendation to which this Court will ordinarily defer if the JTC has "adequately articulate[d] the bases for its findings and demonstrate[d] there is a reasonable relationship between such findings and the recommended discipline." *Brown*, 461 Mich at 1292. I believe the JTC's findings and recommendations are supported by the record, and agree that respondent's misconduct warrants removal from office. This is confirmed by my review of the *Brown* factors, see *Brown*, 461 Mich at 1292-1293, as follows:[39]

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[39] The JTC stated that "[w]hile [its] conclusion is based on the totality of the circumstances, [it is] primarily motivated by the conduct alleged in Count I [moving outside the division from which he was elected] of the Complaint and by Respondent's lack of candor and honesty with the

(1) Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.

The JTC found that this factor "weighs heavily in favor of a severe sanction," because respondent had engaged in "a long pattern of deceit" to hide that he was living outside the 1st Division from 2000 to 2008. I am in agreement with this finding. Respondent moved outside his district in 2000 and continually changed his driver's license and voter's registration to other addresses within the 1st Division, and engaged in other actions that served no purpose other than to prevent detection. Further, during a visit from SCAO, respondent was accused of not living within the division from which he was elected. In response, he falsely stated, "I am too." Respondent then changed his telephone number on two separate occasions to his Belding Road property, with calls forwarded to 201 Honey Creek, again to prevent his relocation outside his electoral district from coming to light. It was only after respondent was confronted with a homestead exemption form, which clearly showed that he was living at 201 Honey Creek after 2005, that he finally admitted he was living outside his division after 2005. These actions demonstrate a pattern and practice of conduct designed to conceal. I believe that the JTC correctly concluded that this factor weighs in favor of a more severe sanction. I also conclude that respondent's inappropriate drawings and comments, which consisted of three incidents over a 36-year period, cannot be viewed as a part of the same pattern or practice. Therefore, this conduct does not increase the severity of the first *Brown* factor.

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master and the Commission." Accordingly, the JTC did not analyze the misconduct set forth in part V(D) in the context of the *Brown* factors. Instead, it stated that "standing alone" such conduct would only "merit a public censure."

(2) Misconduct on the bench is usually more serious than the same misconduct off the bench.

The JTC correctly found that respondent's conduct occurred off the bench, which suggests that a less severe sanction is appropriate.

(3) Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.

The JTC concluded that respondent's conduct, which calls into question his title to office before 2008, jeopardized every judgment that he has imposed from the bench. This is so, it argues, because, without lawful authority to render judgments, those judgments are at risk of being invalidated.[40] I respectfully disagree with this legal conclusion for the reasons stated in *People v Russell*, 347 Mich 193, 196-197; 79 NW2d 603, 605 (1956). I nonetheless agree with the JTC that this factor militates in favor of a more severe sanction. Although

[40] Although this argument is not at all frivolous, I believe this Court has generally addressed, and rejected, a similar argument in *People v Russell*, 347 Mich 193, 196-197; 79 NW2d 603, 605 (1956):

> We are not inclined to stop and examine the question of whether such magistrate had authority to hold the office he in fact occupied and to which he had color of authority, but content ourselves with applying the rule that if the magistrate was a *de facto* officer his act in this public matter cannot be attacked in this proceeding nor his title to the office be here passed upon. Upon the high ground of public policy and to prevent a failure of public justice, we follow the salutary rule that while one is in public office, exercising the authority thereof under color of law, we cannot, except in a direct proceeding to test his right to the office, pass upon the question here raised, and besides it would avail defendant nothing because there is no difference between the acts of *de facto* and *de jure* officers, so far as the public interests are concerned. The point is ruled adversely to defendant in *Gildemeister v Lindsay*, 212 Mich 299; 180 NW 633 [(1920)] . . . . Even though the law creating a judicial office be declared void the acts of an official thereunder will be upheld as the acts of a *de facto* officer. [Citations and quotation marks omitted.]

respondent's decisions may remain valid and binding legal decisions, I do believe that the *propriety* of these decisions raises legitimate concerns. In particular, I believe that the losing parties in these decisions—who above all participants in the legal process must be genuinely persuaded of the legitimacy and integrity of this process—may understandably feel embittered or resentful concerning the decisions in their own cases.

> (4) Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.

For the reasons set forth in the previous factor, I believe that respondent's conduct, at least in retrospect, did create an appearance of impropriety that weighs in favor of a more severe sanction. Because it views this factor as largely duplicative of the considerations set out in the previous factor, the JTC concludes, and I agree, that this factor does not assist significantly in determining an appropriate sanction.

> (5) Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.

Although I acknowledge that respondent's initial false statements in response to the unannounced visit from SCAO officials were made spontaneously, his conduct thereafter, including his continuing efforts to keep his actual residence prior to 2005 from being discovered, demonstrates that he engaged in a prolonged effort to mislead SCAO, the master, the JTC, and this Court about his living arrangements. Therefore, I agree with the JTC's conclusion that respondent's actions to avoid detection were deliberate and ongoing, and warrant the imposition of a more severe sanction.

> (6) Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal

> controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.

The JTC concluded that respondent's lack of authority to hold office impaired the judicial system's ability reach a just result. I respectfully disagree with the JTC with regard to this factor and do not believe that respondent's conduct undermined the ability of the justice system to discover the truth in legal disputes coming before this Court. Indeed, I do not believe his conduct affected the substantive determination of any case or controversy, assuming, as I do, that respondent continued during the period in controversy to act as a responsible judicial decision maker as his record suggests he has done for the past 36 years. That his conduct may have undermined the ability of the public, and the administrative systems of this Court, to identify his misconduct in moving his domicile is a factor that is more appropriately taken into account in the first and fifth factors.

> (7) Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

As concluded by the JTC, this factor does not apply to respondent's conduct, and thus suggests that a more severe sanction should not be imposed.

VII. SANCTIONS

This Court having promulgated the *Brown* factors, and the JTC having evaluated them in this case, "proper deference" is now required on our part. *Noecker*, 472 Mich at 20 (2005) (MARKMAN, J., concurring). Of foremost significance in determining an appropriate

sanction for respondent's particular misconduct are the first and fifth factors. Because respondent engaged in a prolonged and deliberate effort to mislead SCAO, the master, the JTC, and this Court, as described in this opinion, including and especially testifying falsely under oath, I believe the JTC has reasonably concluded that respondent should be removed from office.

Although respondent's 36 years of honorable service on the bench, and his excellent reputation, as evidenced both by statements contained within the record and by his reelection in 2008 after the people of his judicial district had been made at least partially aware of the circumstances of the JTC investigation, constitute substantial factors in respondent's favor in determining a proportionate sanction, in the final analysis these factors do not, in my judgment, outweigh his serious misconduct in this case. See also *Noecker*, *supra*. As Justice YOUNG offered in his dissent, " '[s]ome misconduct, such as lying under oath, goes to the very core of judicial duty[.]' " *Post* at 717 (citation omitted). So too, I believe, does respondent's conduct in knowingly vacating his district "go to the very core of the representative duty" in our system of self-government. Accordingly, I agree with Justice YOUNG's dissent in this regard, as well as with the JTC's unanimous recommendation, that respondent be removed from office.

VIII. CONCLUSION

Pursuant to the JTC's unanimous recommendation, I believe that respondent's misconduct in this case warrants that he be removed from office. In moving outside the district from which he was elected, respondent violated the law and constitution, he violated the fundamental bond with the people of his district established by our system of republican self-government, and he testified

falsely with regard to these actions. For the reasons set forth in this opinion, I would hold that respondent should now be removed from office.

CORRIGAN, J., concurred with MARKMAN, J.

CORRIGAN, J. (*dissenting*). I join Justice MARKMAN's dissenting opinion in all respects. I also join parts A and B of Justice YOUNG's dissenting opinion, including the discussion of respondent's untruthful testimony and the conclusion that removal from office is the appropriate sanction for respondent's lying under oath.

I write separately only to observe that respondent advances a far more compelling argument for a due process violation than I have seen in any prior Judicial Tenure Commission (JTC) case. The JTC executive director engaged in unnecessarily harsh tactics when he confronted respondent by surprise and attempted to obtain his resignation by 9:00 a.m. the next day. Although the executive director purported to speak for the JTC during his meeting with respondent, the record does not establish that the JTC approved all of the executive director's tactics. Moreover, an impartial master appointed by this Court conducted a hearing and found the facts in this matter, the JTC's decision is merely a recommendation to this Court, and the ultimate disciplinary decision is rendered by this Court after a de novo review. Thus, I conclude that respondent has not demonstrated an intolerably high risk of unfairness that is required to establish a due process violation.

In *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975), the United States Supreme Court held that the combination of investigative and adjudicative functions in a single entity does not necessarily violate due process:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

The Supreme Court explained that it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrate Procedure Act, and it does not violate due process of law." *Id*. at 56. Although the combination of investigative and adjudicative functions does not by itself establish a due process violation, a court may nonetheless determine "from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." *Id*. at 58.

In *In re Del Rio*, 400 Mich 665; 256 NW2d 727 (1977), this Court followed *Withrow* in holding that the combination of investigative, adjudicative, and disciplinary roles of the JTC did not render it incapable of ensuring due process. This Court emphasized that the JTC's role is limited to submitting its recommendations to this Court, and that this Court alone decides what, if any, disciplinary action should be taken.

> This Court has made a conscious effort to segregate within the Commission the investigative and adjudicative functions. We specifically require under GCR 1963, 932.10, that an independent master be appointed by this Court to

> preside over the adjudicative process once the Commission files a formal complaint. It is this master who also makes the findings of fact and conclusions of law upon which the Commission makes its recommendation and this Court ultimately bases its decision. Therefore, this Court, like the United States Supreme Court in *Withrow*, *supra*, 58, does not believe that the combination of the investigative and adjudicative roles in the Judicial Tenure Commission creates even a risk that due process guarantees could be violated. [*Id*. at 691.]

In *In re Chrzanowski*, 465 Mich 468, 486-487; 636 NW2d 758 (2001), we followed *Withrow*, *Del Rio*, and other Michigan authorities to hold that the JTC's procedures afforded sufficient due process protections, and we found no special facts or circumstances to suggest an intolerably high risk of unfairness:

> As to the procedures, first, pursuant to MCR 9.207(B)(3), the JTC conducted a preliminary investigation to determine whether respondent's alleged conduct warranted further action. Second, after determining that sufficient evidence of misconduct existed, the JTC filed a formal complaint pursuant to MCR 9.208. Third, a master was appointed, notice was given, and a hearing was then afforded respondent under MCR 9.210(A) and MCR 9.211, with the JTC's executive director serving as prosecutor-examiner under MCR 9.201(6). . . . Finally, the JTC's conclusion that Judge Chrzanowski should be disciplined was ultimately just a recommendation to this Court that we are charged to review de novo pursuant to deciding what discipline, if any, is appropriate. As in *Withrow*, the JTC's investigative and adjudicative procedures are functionally separate; additionally, as distinct from *Withrow*, in which the investigation and the decision were undertaken by the same Medical Examining Board, here the master, the examiner, and the JTC panel are separate entities. If the board in *Withrow* did not violate due process rights by investigating, and then adjudicating claims, it can hardly be argued that the JTC's procedures violated due process. Further, a majority of the members of the JTC are judges,

> and all the members who ultimately recommend discipline are assumed to be fair and impartial. We conclude then that there was no actual bias in the JTC's decision. It had authority to review the master's findings de novo, and reasonably determined, by a preponderance of the evidence, that respondent had in fact made false statements. We find these procedures adequately separated the JTC's investigative and adjudicative functions.

On the basis of these authorities, I do not find a due process violation in this case. The JTC followed the very same procedures that we concluded in *Del Rio* and *Chrzanowski* were sufficient to ensure due process. That is, a master was appointed to find the facts that formed the basis for the JTC's decision, the JTC's decision was only a recommendation to this Court, and this Court bears the ultimate responsibility on its de novo review to decide what, if any, discipline is warranted.

Nonetheless, a close question is presented regarding whether special facts and circumstances created an intolerably high risk of unfairness. The JTC's executive director confronted respondent without warning in his chambers, accompanied by an armed police escort who surreptitiously recorded the meeting. The executive director provided respondent with documents alleging misconduct and indicated that he would obtain respondent's interim suspension if he did not resign by 9:00 a.m. the next day. The executive director also presented a resignation letter that had already been prepared *on respondent's own office stationery*. The executive director represented that he was speaking on behalf of the JTC, stating:

> The Commission is offering you this opportunity to resolve this matter as quickly as possible and not bring any shame, proceedings, accusations of perjury against you. You can resign immediately. And immediately means im-

> mediately. I have a letter right here you can sign. The Commission has said that I can give you until tomorrow morning. I prefer to take the letter with me right now.

When respondent stated that he would like to talk to someone "who knows this area much better that [sic] I do," the executive director responded, "Yeah. So here's a letter already prepared for you. If I have that letter faxed to me — my fax number is on that card that I just gave to you. If I have that letter faxed to my office by 9 a.m., and I mean by 9 a.m."

Respondent stated that he could not make a decision by then, to which the executive director replied:

> Then I'll be filing the petition for interim suspension tomorrow and you will be suspended in a matter of days. And a formal complaint will issue with this. So, this will all . . . . You're up for election this year. So, this is all going to become public no later than March. You'll be off the bench before then.
>
> * * *
>
> You have until tomorrow morning at 9. And I haven't even touched — I haven't even touched the sexual harassment — the little notes that you draw, the comments you make to the staff. I mean, we haven't even gotten . . . . Oh yeah. We haven't even gotten there.
>
> * * *
>
> You may think that because you were born in 19 whatever it was—forty something or other, that you're from an old enough generation that can get away with saying certain things, but it's just not true.

The executive director later repeated that "[i]f the Commission has your letter of resignation by tomorrow by 9 a.m., this matter will be gone. Nobody will hear about it. You'll have a retirement party. Everybody will

go home happy." But, the executive director stated, if respondent fought the allegations, "I almost welcome the opportunity. Or you can take the easy way out and take a resignation."

When respondent asked to see a file referred to in one of the alleged sexual drawings that the executive director provided, the executive director stated, "I'm not here now to do any type of interview with you. I'm not here to explain anything else." When respondent asked what other evidence formed the basis for the allegations, the executive director stated:

> Sir, I've followed the court rules. The rules are provided in 9.200 and following. We've complied with the court rules. I've come here to personally to [sic] give you this to perhaps avoid any embarrassing situations. I've come here to perhaps avoid having to drag your name through the mud with what is going to come out at a formal hearing and to give you an opportunity to obviate all that and retire quietly. I'm not here to discuss the matter with you.

The executive director later stated, "If we push this all the way, everybody's going to know why you left because you got thrown off the bench."

As the above excerpts reflect, the executive director's tactics were unnecessarily harsh. The executive director essentially ambushed respondent in his chambers with the allegations, demanded his immediate resignation by 9:00 a.m. the next day, and refused to answer respondent's questions regarding the bases for the allegations.

The record does not, however, reflect that the JTC itself approved all these tactics. Although the executive director represented that "the Commission" was giving respondent until 9:00 a.m. the next morning to resign, the record does not indicate whether the JTC approved the surprise nature of the confrontation, the refusal to

answer respondent's questions, or the abrasive disregard of respondent's request for more time to talk to someone.

I am extremely concerned about the grounds for the JTC's decision to exclude from the record the audio recording of the executive director's confrontation with respondent, because it gives rise to a possible inference of collaboration. Respondent submitted the recording as one of several attachments to his brief in support of his objections to the master's report. The JTC granted the examiner's motion to strike the attachments. The JTC chairperson explained the basis for that decision:

> The presentation of additional evidence after the conclusion of a public hearing as [sic] governed by MCR 9.218. That rule provides that the Commission may order a hearing with at least 14 days' notice. That process was not found [sic] in this case. Accordingly, the motion to strike was hereby granted.

The court rule cited by the chairperson, MCR 9.218, provides:

> The commission may order a hearing before itself or the master for the taking of additional evidence at any time while the complaint is pending before it. The order must set the time and place of hearing and indicate the matters about which evidence is to be taken. A copy of the order must be sent to the respondent at least 14 days before the hearing.

Regardless of whether the striking of the audio recording was a correct decision under MCR 9.218, I have no real evidentiary basis to question the conclusion that the JTC decided the motion on the basis of its stated rationale rather than because of any effort to conceal the audio recording.

Therefore, I conclude that the executive director's punitive tactics alone do not rise to the level of special

facts or circumstances that would create an intolerably high risk of unfairness. The record does not show that the JTC members exhibited any bias or prejudgment, and respondent has not overcome the presumption of honesty and integrity in those serving as adjudicators. *Withrow*, *supra* at 47. Moreover, an impartial master appointed by this Court conducted the hearing and found the relevant facts, the JTC's decision was merely a recommendation to this Court, and it is this Court, after the de novo review, that now renders a decision regarding the appropriate discipline, if any, that should be imposed. *Del Rio*, *supra*; *Chrzanowski*, *supra*.

Accordingly, despite my serious concerns regarding the executive director's behavior during his confrontation with respondent, I am not convinced that respondent has established a violation of his due process rights.

YOUNG, J. (*dissenting*). I join in parts V(A) and (C) of Justice MARKMAN's opinion. Like Justice MARKMAN and the Judicial Tenure Commission (JTC), I conclude that respondent lied during the JTC proceedings and that this misconduct alone provides sufficient basis for removing him from office.[1] I write separately because I decline to address whether the JTC has the authority to determine if respondent vacated his office in violation of Const 1963, art 6, § 20 during the course of judicial disciplinary proceedings because respondent *admitted* that he changed his primary residence from the first to the second election division from August 2005 to February 2008. Given respondent's admission that he

[1] I am aware of the behavior exhibited by the executive director of the Judicial Tenure Commission in January 2008. However, the propriety of his actions is best addressed by the Attorney Grievance Commission, and is not before the Court today. Rather, the sole issue before the Court is whether respondent's actions constitute judicial misconduct.

moved outside his election division,[2] I believe that a formal determination of the JTC's power to decide such a question independent of respondent's admission is unnecessary in this case and do not reach a conclusion in the question debated by Justices MARKMAN and WEAVER in their respective opinions.

A. RESPONDENT LIED UNDER OATH

I fully agree with Justice MARKMAN's analysis of the record in parts V(A) and (C) regarding respondent's untruthful testimony. What is startling is that the majority accepts without question respondent's proffered justification for vacating his office—that respondent "thought he could live in [the second election] division as long as he was not running for reelection."[3] Were this justification true, one would have expected respondent to live openly and notoriously at his legal residence, wherever that residence happened to be located within the 63rd District. However, review of the record reveals quite the opposite—respondent's actions during the relevant period were completely inconsistent with one who *honestly* believed that he could freely live outside his election territory.

Respondent acknowledged that he moved his legal

[2] I believe that respondent's admission establishes that he violated Const 1963, art 6, § 20. Because the law forbids abandonment of office while the office holder continues to function in that office, it is sanctionable judicial misconduct for any judge to continue serving in an office that he has vacated. However, in light of my conclusion that respondent lied under oath, and that this misconduct alone warrants his removal, I do not believe it necessary to address the appropriate sanction for either the abandonment of office violation or the sexually inappropriate misconduct that the JTC also concluded respondent committed.

[3] *Ante* at 653. However, respondent asserted in his brief yet a different justification in his brief, claiming that he was "only required to live within the *district* in which the court sits" and could "make his principal residence in any *division* within that *district*." (Emphasis in original.)

residence out of the 1st election division in 2005. Significantly, respondent acknowledged that he knew that he was required by law to change his address after he moved. However, respondent never changed the address on his driver's license to reflect his move to the second election division.[4] Additionally, despite acknowledging that he was legally required to do so, respondent never changed his voter registration information from the first to the second election division. In fact, respondent fraudulently continued to vote *as though he still lived* in the 1st election division.[5]

Moreover, respondent continued to list his 1st election division address as his "residential address" on his 2007 application to carry a concealed weapon (CCW).[6] This latter act is particularly egregious because the CCW application is an affidavit that states:

> Read the following statements and, if you agree, sign below at the time of submission with the clerk.

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[4] The law requires a person to "*immediately* notify the secretary of state of his or her new residence address," and the failure to do so is punishable by a civil infraction. MCL 257.315(1) and (3) (emphasis added).

[5] Voting in a district other than that associated with one's place of residence is prohibited by law. MCL 168.932a(d). Nevertheless, respondent claimed that he was entitled to vote in a district where he did not reside because he owned a house in the first election division and "paid the taxes." However, as our constitution provides, and any voting citizen in this state well knows, an elector is qualified by meeting the "requirements of local residence," not simply by paying taxes. Const 1963, art 2, § 1. Moreover, "residence" is defined at MCL 168.11 as the "place at which a person habitually sleeps, keeps his or her personal effects and has a regular place of lodging." At the time respondent fraudulently voted in the first election division, respondent testified that his property in the first election division was occupied and leased to a "guy who wants to buy it." I find that respondent's continued voting in his former electoral district after admitting that he had changed his legal residence *entirely* undermines his credibility and defense.

[6] In addition to being a falsehood, this act is prohibited by law. MCL 28.425b(3).

* * *

> I understand that this application is executed under oath and swear or affirm under penalty of law that the above answers are true and correct to the best of my knowledge. I understand that intentionally making a false statement is a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2500, or both.

Consequently, by signing this application with the incorrect address of residence, respondent *again* lied under oath. Despite this, respondent's defense is that he did not read the application before signing it. This has *never* been a valid defense to false swearing on a document requiring an attestation of truthfulness.[7] The majority's acceptance of respondent's excuse is as shameful as respondent's attempt to minimize the consequence of his dishonesty. We judges demand more of ordinary citizens who appear before us in court. Thus, it is hard to understand the "free pass" the majority has given a fellow member of the judiciary who ought to be held to *at least* the standard of honesty we require of others.

Respondent's intentional violation of the laws governing voting, driver's licenses, and CCW licensing are independently troubling, not inadvertent, and form a pattern of intentional misdirection. If respondent *truly* believed that he was free to live in the second election division, then why would he take such great pains to make it appear as though his legal residence was still in the 1st election division? I think the answer is clear.

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[7] In fact, the "I didn't read it" defense is not a cognizable defense for *any* written document in Michigan, much less a document requiring an *attestation of truthfulness*. See *Otto Baedeker & Associates, Inc v Hamtramck State Bank*, 257 Mich 435; 241 NW 249 (1932); *Int'l Transportation Ass'n v Bylenga*, 254 Mich 236; 236 NW 771 (1931); *Collier v Stebbins*, 236 Mich 147; 210 NW 264 (1926); *Gardner v Johnson*, 236 Mich 258, 210 NW 295 (1926).

Respondent took pains to conceal his true residence because he had reason to know that he was *not* living in the proper election division. After respondent filed a homestead exemption for his second election division home in 2005, it became increasingly impossible for respondent to maintain the lie regarding his legal residence being outside his election division.

Additionally, the testimony indicated that between 2000 and the end of 2004 respondent provided court staff with a telephone number to his property in the second election division for the court's after-hours duty log.[8] However, beginning in January 2005, respondent provided a telephone number to his property in the 1st election division, but the testimony indicated that calls placed to this number were *forwarded* to his address in the second election division. Beginning in January 2006, testimony indicated that the after-hours telephone number was changed to a telephone number in the second election division because respondent "was having problems with his fax machine and he thought that the call forwarding from the other phone was the problem with the fax machine." However, in July 2006, respondent again reverted to providing court staff with a 1st election division telephone number that was again forwarded to his telephone in the 2nd election division. While the testimony indicated that respondent provided the telephone numbers to the court administrator, at the hearing respondent claimed that the telephone numbers "didn't come from [him]" and claimed to be unable to recognize his own telephone number, despite the fact that the telephone number was provided to the court administrator *a mere eighteen months* before the

[8] The logs, prepared in three-month intervals, provided law enforcement a means of contacting a member of the 63rd District judiciary after regular business hours.

hearing.[9] When asked if he had ever had calls forwarded from one address to another, respondent evasively answered "no, not that I know of." I reject the ridiculous notion that respondent could not recognize his own telephone number and did not "know" whether he had forwarded telephone calls from one property to the other. More fundamentally, if respondent *truly* believed that he was free to live legally in the second election division and maintain his judicial office, there would have been no need to forward his telephone calls *at all*. Thus, I completely agree with Justice MARKMAN that the record establishes that respondent repeatedly lied under oath. The majority incredulously claims that "respondent did *nothing* to hide the fact" that respondent resided in his second election division home from 2005; however, the plain facts contained in the record indicate otherwise.[10]

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[9] Because of his need to maintain the deception about the place of his legal residence, even small things became problematic for respondent to admit. He was extraordinarily evasive in his testimony before the JTC. I offer the following example of respondent's evasive testimony:

> *Q*: So it's July, August, September 2006.
>
> *A*: Right.
>
> *Q*: With a phone number that's listed there that ends in a 30 that you've read. Do you recognize that phone number as one of your home phone numbers?
>
> *A*: No.
>
> *Q*: You don't know what that phone number is?
>
> *A*: I don't — I mean I'm not saying it isn't, but I — and I don't know how it got there, because I didn't give it to anybody.

[10] The majority cites as conclusive evidence the fact that respondent was listed in the local telephone book as proving he "did nothing to hide the fact" that he resided in the second election division. However, a listing in the telephone book merely indicates that respondent had *an*

B. SANCTION

Having determined that the record fully supports that respondent lied under oath, I believe that the only appropriate sanction is removal from office.[11] As I noted in *In re Noecker*:[12]

> The purpose of Judicial Tenure Commission proceedings is not the punishment of the judge, but to maintain the integrity of the judicial process and to protect the citizenry from corruption and abuse. As such, this Court's primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.
>
> * * *
>
> Our judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As

address and telephone number in the second election division. A listing in the telephone book does not indicate one's legal residence. One's voter registration and driver's license *are* indicative of legal residence and, as stated, these indicia do not support respondent's or the majority's position. Let us not forget that respondent affirmatively *attested* to the incorrect residence address on his 2007 CCW license application.

[11] This Court has generally removed a judge from office when it has been determined, in whole or in part, that a judge has provided false testimony or evidence in JTC proceedings. See *In re Ryman*, 394 Mich 637, 232 NW2d 178 (1975); *In re Loyd*, 424 Mich 514; 384 NW2d 9 (1986); *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998) ("Judges, occupying the watchtower of our system of justice, should preserve, if not uplift, the standard of truth, not trample it underfoot or hide in its shady recesses. This is precisely why judges should be exemplars of respectful, forthright, and appropriate conduct."); *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005); *In re Nettles-Nickerson*, 481 Mich 321; 750 NW2d 560 (2008). The only exception I can discern is *In re Thompson*, 470 Mich 1347 (2004), where the JTC and respondent reached a plea agreement for a 90-day suspension, and the complaint included an allegation that respondent "demonstrated a lack of candor" before the JTC.

[12] 472 Mich 1, 691 NW2d 440 (2005).

> the "focal point of the administration of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and *becomes unfit to sit in judgment of others*. . . . [S]ome misconduct, such as lying under oath, goes to the very core of judicial duty and *demonstrates the lack of character of such a person to be entrusted with judicial privilege*.[13]

For these reasons, I would adopt the recommendation of the JTC and remove respondent from office.

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[13] *Id*. at 16-17 (emphasis added).

PEOPLE v LOWE

Docket No. 137284. Decided August 13, 2009.

Jamie L. Lowe pleaded guilty in the Hillsdale Circuit Court of possession of methamphetamine, which carries a maximum sentence of 10 years. The defendant's recommended minimum sentence range under the sentencing guidelines was 10 to 23 months. As a repeat controlled substances offender, the defendant was subject to MCL 333.7413(2), which authorizes the sentencing court to impose a sentence "for a term not more than twice the term otherwise authorized . . . ." The court, Michael R. Smith, J., doubled both the minimum and maximum sentences and sentenced the defendant to 46 months to 20 years in prison. The defendant filed a delayed application for leave to appeal, asserting that the court had erred by doubling his minimum sentence. The Court of Appeals, JANSEN, P.J., and CAVANAGH, J. (GLEICHER, J., voting to grant leave), denied leave to appeal in an unpublished order, entered August 15, 2008 (Docket No. 286373). The defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 483 Mich 889 (2009).

In an opinion by Justice MARKMAN, joined by Justices WEAVER, CORRIGAN, YOUNG, and HATHAWAY, the Supreme Court *held*:

MCL 333.7413(2) authorizes a sentencing court to double both the minimum sentence and the maximum sentence of a defendant who is a repeat controlled substances offender because the statute allows the court to enhance the defendant's sentence to "not more than twice the term otherwise authorized" for the underlying offense. Under Michigan's indeterminate sentencing scheme, the "term otherwise authorized" describes an indeterminate sentence, which is defined by both a minimum sentence and a maximum sentence. Interpreting the phrase "term otherwise authorized" to include both the minimum and maximum sentences gives effect to the word "term" and all other words in the statute and is consistent with the ordinary parlance used by the courts of this state to describe indeterminate prison sentences. Doubling a defendant's minimum and maximum sentences ensures that, as a general matter, the defendant will serve more time in prison under

the enhanced sentence than the defendant would have served under the unenhanced sentence otherwise authorized.

Affirmed.

Justice CAVANAGH, joined by Chief Justice KELLY, dissenting, disagreed that MCL 333.7413(2) permits a sentencing court to double the minimum sentence and would hold that the statute only authorizes a court to double the statutory maximum sentence. Interpreting the statute as allowing the doubling of the minimum sentence creates a conflict between MCL 333.7413(2) and MCL 769.34(2), which requires that all minimum sentences imposed fall within the range calculated under the sentencing guidelines absent a departure. The Legislature, in MCL 777.18, expressly included MCL 333.7413(2) among the statutes covered by the sentencing guidelines. The "term otherwise authorized" that MCL 333.7413(2) refers to and allows to be doubled is the maximum penalty for the underlying controlled substances offense. This interpretation harmonizes the statutory sentencing scheme as a whole. The judgment of the Court of Appeals should be reversed, and the case should be remanded for resentencing.

SENTENCES — CONTROLLED SUBSTANCES — REPEAT OFFENDERS — SENTENCING GUIDELINES — DOUBLING OF MINIMUM SENTENCES.

MCL 333.7413(2) authorizes a sentencing court to double both the minimum sentence calculated under the sentencing guidelines and the statutory maximum sentence of a defendant who is a repeat controlled substances offender.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Neal A. Brady*, Prosecuting Attorney, for the people.

State Appellate Defender (by *Brandy Y. Robinson*) and *Ronald D. Ambrose* for the defendant.

MARKMAN, J. This case presents the question whether MCL 333.7413(2), by authorizing a trial court to enhance the sentence of a defendant who is a repeat drug offender to a "term not more than twice the term otherwise authorized," allows the trial court to double *both* the defendant's minimum and maximum sen-

tences. We answer this question in the affirmative. Accordingly, defendant's sentence is affirmed.

I. BACKGROUND

Defendant pleaded guilty to possession of methamphetamine, MCL 333.7403(2)(b)(*i*), with a sentence enhancement as a repeat drug offender, MCL 333.7413(2). At sentencing, the trial court calculated defendant's minimum sentence range under the sentencing guidelines at 10 to 23 months. Pursuant to § 7413(2), the trial court, relying on *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005), doubled both the minimum and maximum sentences and sentenced defendant to 46 months to 20 years in prison.[1] Defendant did not object to the sentence, but sought leave to appeal in the Court of Appeals, contending that the trial court had erred by doubling his minimum sentence. The Court of Appeals denied leave to appeal in a split decision, and defendant applied for leave to appeal in this Court. We heard oral argument on his application.

II. STANDARD OF REVIEW

This Court reviews de novo questions of statutory interpretation. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

III. ANALYSIS

MCL 333.7413(2) provides for enhanced sentencing for defendants convicted of a second or subsequent controlled substance offense:

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[1] Possession of methamphetamine typically carries a maximum sentence of 10 years. MCL 333.7403(2)(b)(*i*).

> Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.[2]

Defendant argues that the phrase "the term otherwise authorized" only refers to the statutory maximum sentence, and that the trial court therefore erred by doubling the minimum sentence guideline range. Consequently, his minimum sentence should have been within the original minimum sentence guideline range of 10 to 23 months. The prosecutor responds that, based on Michigan's indeterminate sentencing scheme,[3] "the term otherwise authorized" refers to the period demarcated by both the minimum and maximum sentences and thus the court correctly doubled *that* "term" by doubling both the minimum and maximum sentences. Obviously, the resolution of the instant dispute rests on the meaning of "the term otherwise authorized."

The Court's responsibility in interpreting a statute is to determine and give effect to the Legislature's intent. *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). The statute's words are the most reliable indi-

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[2] MCL 333.7413(5) provides:

> For purposes of [§ 7413(2)], an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug.

Defendant had been convicted of at least one prior drug-related offense.

[3] An indeterminate sentence is one the specific duration of which is "not fixed by the court but is left to the determination of penal authorities within minimum and maximum time limits fixed by the court." Black's Law Dictionary (5th ed).

cator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Once the Court discerns the Legislature's intent, no further judicial construction is required or permitted "because the Legislature is presumed to have intended the meaning it plainly expressed." *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

The word "term" is relevantly defined as "the time or period through which something lasts" or "a period of time to which limits have been set." *Random House Webster's College Dictionary* (1997). The "term" that a court is permitted to double in § 7413(2) is the "term otherwise authorized." "[O]therwise authorized" undoubtedly refers to the term provided by law and for which a defendant would be imprisoned absent any enhancement under § 7413(2). Thus, the "term otherwise authorized" is a "period of time," or more specifically a "period of time to which limits have been set," by law.

Because Michigan generally adheres to an indeterminate sentencing scheme,[4] the term for which a defendant would "otherwise" be imprisoned absent an enhancement is not a definite period "through which [imprisonment] lasts." Rather, it is an indefinite "period" that is defined by a minimum and maximum sentence. In the instant case, for example, defendant's unenhanced sentence would likely have been 23 months to 10 years.[5] *This* sentence is best understood as "the

[4] Article 4, § 45, of the Michigan Constitution provides that the "legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."

[5] This presumes that the trial court would have sentenced defendant at the top of the minimum sentence guideline range just as it sentenced defendant at the top of the enhanced guideline range.

term otherwise authorized," because: (a) it identifies the "period of time" that a defendant has to remain in prison as a function of "limits [that] have been set" by the minimum sentence guidelines and the statutory maximum;[6] and (b) this "period of time" has been calculated as "authorized" by law.

That the indeterminate sentence that a defendant typically receives under Michigan law constitutes a "term" is supported by the ordinary parlance used by the courts of this state to describe indeterminate prison sentences. See, e.g., *People v Smith*, 482 Mich 292, 297; 754 NW2d 284 (2008) ("The judge sentenced defendant to three concurrent *terms* of 30 to 50 years' imprisonment . . . .") (emphasis added); *People v Williams*, 475 Mich 245, 248; 716 NW2d 208 (2006) ("[Defendant] was sentenced to a one- to fifteen-year *term* of imprisonment.") (emphasis added); *People v Conyer*, 281 Mich App 526, 527; 762 NW2d 198 (2008) ("Defendant was sentenced to serve consecutive prison *terms* of 30 to 120 months . . . .") (emphasis added); *People v Matuszak*, 263 Mich App 42, 45; 687 NW2d 342 (2004) ("Defendant was sentenced to concurrent prison *terms* of fifteen to thirty years . . . .") (emphasis added). These are only a tiny sampling of the hundreds of decisions in which a defendant's indeterminate sentence range is consistently referred to as a "term."[7] Such ordinary and persistent use of "term" to describe this range establishes clearly, in our judgment, that the sentence expressed by reference to both the minimum and maximum sentences constitutes a "term."

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[6] Defendant would have had to serve no less than 23 months and no more than 10 years.

[7] See the results generated by a Lexis or Westlaw search with the following parameters: sentence! /s "term of".

Thus, under Michigan's scheme of indeterminate sentencing and the courts' implementation of that scheme, the "term otherwise authorized" is not exclusively the minimum sentence *or* the maximum sentence, but it is the actual indeterminate sentence, which is defined by both the minimum and maximum limits for that sentence. In other words, the "period of time" that a defendant could potentially spend in prison lies somewhere between the minimum and the maximum allowable sentences, and accordingly those sentences operate in tandem to define the "term" for which a defendant has been sentenced. In order to double this "term," a trial court necessarily has to double both the minimum and maximum sentences because both are required to constitute a particular "term."[8] Accordingly, § 7413(2)'s authorization for a trial court to imprison a defendant for a "term not more than twice the term otherwise authorized" signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the "term otherwise authorized."[9]

Moreover, interpreting "the term otherwise authorized" as the indeterminate sentence created by both the minimum and maximum sentences is the only way to give consistent effect to § 7413(2)'s directive that the defendant be "imprisoned for a term *not more than twice* the term otherwise authorized" when the trial

[8] We recognize that the statute does not *require* the trial court to double a defendant's sentence; rather, it allows an enhancement up to "not more than twice" the original term. Merely for ease of discussion throughout this opinion, we assume that the trial court's chosen enhancement is twice the original term.

[9] Because § 7413(2) specifically allows the court to double the guideline range, as long as the minimum sentence of the enhanced term is within the doubled range, we conclude that there is also no departure from the guideline range when such a sentence is imposed. See *People v Williams*, 268 Mich App at 430.

court doubles the "term otherwise authorized." (Emphasis added.) The alternative interpretation suggested by defendant, with which the dissent agrees, creates a risk that this statutory directive will be violated, because defendant would have this Court treat the maximum sentence, but not the minimum sentence, as a "term," even though both sentences, equivalently, constitute periods of time through which defendant's prison time may last.[10] Assume that defendant is sentenced to 23 months to 20 years.[11] It would be impossible for defendant to serve this maximum sentence, because to do so would mean that defendant will have been imprisoned for a term "more than twice the term otherwise authorized," since defendant's interpretation necessarily means that the minimum sentence must be treated as a "term otherwise authorized." That is, the statute itself would have been violated because defendant's term of imprisonment, i.e., 20 years, would be *10* times longer than the 23-month "term" that defendant asserts is "otherwise authorized," which directly conflicts with the statutory requirement that defendant can only be imprisoned for a term "not more than twice" that "term."

By contrast, when the "term otherwise authorized" is interpreted as the indeterminate sentence designated by both the minimum and maximum sentences, and when both of these sentences are doubled, the defen-

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[10] As the Court of Appeals noted in *People v Williams*, 268 Mich App at 427, "the clear and unambiguous language of MCL 333.7413(2) does not differentiate or suggest a distinction . . . between maximum and minimum sentences[.]" Accordingly, nothing within the statute can fairly be read to support applying defendant's suggested meaning of "term" to a maximum, but not a minimum, sentence.

[11] This is based on a minimum sentence at the top of the unenhanced guideline range and twice the statutory maximum sentence. Thus, pursuant to defendant's argument, only the maximum sentence here is doubled.

dant will never be imprisoned for a term *10* times the unenhanced term. Using the previous illustration, when both the minimum and maximum sentences are doubled, the 23-month minimum sentence would be doubled to 46 months, the 10-year maximum sentence would be doubled to 20 years, and, accordingly, the "term otherwise authorized," i.e., 23 months to 10 years, would be doubled to 46 months to 20 years. When a trial court considers *both* the minimum and maximum sentences as the "term otherwise authorized," and doubles each of these to form the enhanced term, the enhanced term will never be *10* times as long as the "term otherwise authorized," but will always be exactly twice as long as the unenhanced term.

Finally, the Legislature's authorization for a defendant to be imprisoned for an enhanced term is most reasonably understood to communicate that the defendant should, in fact, serve *more* time—indeed as a general matter, approximately "twice" as much time—for his enhanced term than for his unenhanced term. Interpreting § 7413(2) to only allow the trial court to double the defendant's maximum sentence would not in reality ensure that the defendant will serve *any* additional time when sentenced for a second drug offense, because the minimum sentence would remain the same and nothing in an indeterminate sentence prevents a defendant from being released after his minimum sentence has been satisfied. Thus, interpreting § 7413(2) to allow both the minimum and maximum sentences to be doubled is most consistent with what is almost certainly the common understanding that a defendant who has been imprisoned for "twice" his original "term" will serve twice what he would have otherwise served.[12]

[12] Admittedly, under Michigan's indeterminate sentencing scheme, there is no way of knowing how much time a defendant would actually

Defendant also contends that MCL 777.21 supports his position that the trial court can only double the maximum sentence under MCL 333.7413(2). MCL 777.21 states in relevant part:

> (3) If the offender is being sentenced under section 10, 11, or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range, increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows:
>
> (a) If the offender is being sentenced for a second felony, 25%.
>
> (b) If the offender is being sentenced for a third felony, 50%.
>
> (c) If the offender is being sentenced for a fourth or subsequent felony, 100%.
>
> (4) If the offender is being sentenced for a violation described in section 18 of this chapter, both of the following apply:[13]
>
> (a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in section 18 of this chapter.
>
> (b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the

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have served under his original sentence. The only certainty is the "term otherwise authorized," and logically the statute authorizes enhancing this known "term."

[13] Section 18 refers to MCL 777.18, in which the Legislature expressly provided that the chapter of the Code of Criminal Procedure encompassing the sentencing guidelines applies to felonies under MCL 333.7413(2).

> offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G.

Defendant relies on the fact that § 21(3) allows a court to increase a defendant's minimum sentence range, but § 21(4), which applies to sentencing under MCL 333.7413(2), only specifies the various offense variables and offense classes to be used in calculating the guideline range. Therefore, he argues, the Legislature's omission of a minimum sentencing enhancement in MCL 777.21(4) indicates that the Legislature did not intend enhancement of minimum sentences for those offenses.

We find defendant's argument unpersuasive. MCL 777.21(4) simply provides the methodology for a trial court to follow in calculating a defendant's minimum sentence guideline range. The lack of a minimum sentence enhancement in that subsection provides no insight into whether MCL 333.7413(2) provides a minimum sentence enhancement, and it is unclear why a lack of a minimum sentence enhancement under MCL 777.21(4) must mean that the Legislature intended MCL 333.7413(2) to also lack a minimum sentence enhancement.[14] The Legislature's silence in MCL 777.21(4) regarding a minimum sentence enhancement cannot preclude the Legislature from providing a minimum sentence enhancement in a separate statute.

IV. RESPONSE TO DISSENT

The dissent concludes that MCL 333.7413(2) should be interpreted to authorize trial courts to enhance only

[14] Contrary to the dissent's assertion that MCL 777.21(4) "does not provide dispositive support" for our interpretation, *post* at 739 n 6, this subsection actually *does* support our interpretation when considered specifically in the context of the sentencing guidelines and MCL 333.7413(2). See *infra* at 729-731.

the maximum sentence for repeat drug offenders because such interpretation avoids a "potential conflict" between § 7413(2) and MCL 769.34(2). *Post* at 736-737. We agree with the dissent's maxim of interpretation that statutes concerning the "same subject matter must be read together and, when possible, construed harmoniously," *post* at 733, but disagree that this compels the dissent's interpretation. In arriving at this disagreement, we consider the equally well-established maxim of interpretation that "the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006) (quotation marks omitted).

As the dissent correctly notes, *post* at 740, prior to enactment of the sentencing guidelines, MCL 333.7413(2) had been interpreted to allow a trial court to enhance both the minimum and maximum sentences when a defendant's "term," defined by those minimum and maximum sentences, was set by statute. See *People v Williams*, 205 Mich App 229, 230; 517 NW2d 315 (1994). The sentencing guidelines now statutorily authorize both the minimum and maximum sentences for a broad range of criminal offenses, thereby making the "terms" of applicable offenses to which § 7413(2) had *not* previously applied the equivalent of the "terms" of offenses to which § 7413(2) *had* previously applied. Thus, our interpretation of § 7413(2) remains consistent with how it was interpreted in *Williams*; applying that decision to the minimum sentence in the instant case is merely a function of the Legislature's decision to enact sentencing guidelines that established minimum sentences.

The dissent further argues that, because the sentencing guidelines apply to defendant's underlying

offense—the possession of methamphetamine—the sentence must be within the minimum sentence guideline range as calculated *for that offense*. *Post* at 737. However, the Legislature expressly provided that the guidelines specifically apply to sentencing done pursuant to § 7413(2), MCL 777.18, and implemented a specific scheme for when "the offender is being sentenced for a violation [of § 7413(2)]," MCL 777.21(4). Under this scheme, the trial court is directed to calculate the minimum sentence range based on the offense variables and offense class for the underlying felony. MCL 777.21(4). Notably, § 21(4) includes no scoring for prior record variables, even though MCL 333.7413(2) only applies if a defendant has, in fact, committed a prior offense. In light of this, it seems reasonable to conclude that the Legislature, knowing that § 7413(2) allowed an enhancement of the minimum sentence, intended the minimum sentence guideline range to be calculated without respect to the underlying offense's repeat nature. If the Legislature had intended for § 7413(2) to operate only as an enhancement of the maximum sentence, then MCL 777.21(4) would have been unnecessary, and the Legislature would have had no reason to apply the minimum sentence guidelines to sentencing under MCL 333.7413(2). Instead, the Legislature could have simply directed the trial court to calculate the minimum sentence guideline range for the underlying felony as if it were not a subsequent drug offense, and then simply apply § 7413(2) to increase the maximum sentence. Yet, it chose not to do this. Rather, construing the legislatively established procedures for determining the minimum sentence guideline range under § 7413(2), in combination with the recognition that the Legislature was aware that § 7413(2) applied to "terms" that had statutory minimums and maximums prior to the enactment of MCL 769.34(2), suggests that the Legislature

intended for the recidivist aspect of the subsequent drug offense to be accounted for by enhancing both the defendant's minimum and maximum sentences pursuant to § 7413(2).[15]

Finally, the dissent contends that we reach our interpretation of "term" through "impressive linguistic gymnastics," without clarifying what these "gymnastics," impressive or otherwise, might be. *Post* at 742 n 10. In fact, we have carefully reviewed the statutory language, and the common understanding of that language, to arrive at our understanding of what constitutes the "term." The Legislature used the phrase "the term otherwise authorized," unadorned by "minimum" or "maximum" or any other modifier. In the dissent's own words, "it is logical that the unmodified word 'term' would be used in order to be applicable to both." *Post* at 742 n 10. More precisely, because the Legislature has not modified "term" with either "minimum" or "maximum," the phrase "the term otherwise authorized" is most reasonably interpreted as the prison term to which a defendant would be sentenced absent any enhancement. See also n 10 of this opinion. In Michigan, such "term" is indeterminate and is established by reference to both the minimum and maximum sentences.

V. CONCLUSION

We hold that MCL 333.7413(2) authorizes the trial court to double both the minimum and maximum

[15] The dissent's suggestion that MCL 777.21(4) "merely demonstrates that the Legislature intended minimum sentences for repeat drug offenders to be calculated under the sentencing guidelines," *post* at 739 n 6, is untenable in light of the dissent's interpretation that MCL 333.7413(2) only affects maximum sentences, and in light of the fact that the Legislature has already provided calculations for drug offenses under the sentencing guidelines.

sentences in order to double defendant's "term otherwise authorized." This understanding gives effect to the Legislature's use of a word, "term," that is ordinarily used to characterize a defendant's indeterminate sentence range, as well as to all other phrases in the statute; it avoids the risk that, contrary to § 7413(2), a defendant's enhanced sentence will be "more than twice" the unenhanced sentence; and it implements the reasonable expectation that a statute authorizing a court to "double" a sentence will ordinarily ensure that, where the trial court acts pursuant to this authorization, a defendant will serve more time in prison under the enhanced sentence than he would have under the unenhanced sentence. Accordingly, the trial court here properly exercised its authority under § 7413(2), and defendant's sentence is affirmed.

WEAVER, CORRIGAN, YOUNG, and HATHAWAY, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's conclusion that MCL 333.7413(2) permits the sentencing judge to double the offender's minimum and maximum sentences. In my judgment, in the context of the overall sentencing scheme, the provision at issue authorizes a sentencing judge to double only the penalty provided within the controlled substances act, MCL 333.7101 *et seq*., which, in this case, is only the maximum sentence. Therefore, I would reverse the judgment of the Court of Appeals and remand the case to the trial court for resentencing.

I. INTRODUCTION

The issue in this case is the proper interpretation of the sentencing enhancement provision in the controlled

substances act, MCL 333.7413(2), which states in relevant part that "an individual convicted of a second or subsequent offense under [the controlled substances act] may be imprisoned for a term not more than twice the term otherwise authorized . . . ." The majority holds that, in addition to authorizing the doubling of the maximum sentence provided for the offense in the controlled substances act, this provision authorizes the doubling of the minimum sentence authorized by the sentencing guidelines in the Code of Criminal Procedure. This interpretation, however, creates a conflict between MCL 333.7413(2) and the provision in the Code of Criminal Procedure, MCL 769.34(2), that requires that all minimum sentences fall within the range calculated under the sentencing guidelines absent a departure. I would instead construe the statutory provisions harmoniously to the extent possible and hold that MCL 333.7413(2) authorizes the doubling of only the penalties provided in the controlled substances act and not the minimum sentences provided by the sentencing guidelines.

II. OVERVIEW OF SENTENCING STATUTES

This case requires reading several sections of statutory code together because, in Michigan, punishment and sentencing for drug offenses are governed by the controlled substances act, which is article 7 of the Public Health Code, and chapters IX and XVII of the Code of Criminal Procedure, MCL 769.1 *et seq*. and MCL 777.1 *et seq*., respectively. Statutes regulating the same subject matter must be read together and, when possible, construed harmoniously. As this Court has stated, " '[a]ll consistent statutes which can stand together, though enacted at different dates, relating to the same subject . . . are treated prospectively and con-

strued together as though they constituted one act.' " *Wayne Co v Auditor General*, 250 Mich 227, 234; 229 NW 911 (1930) (citation omitted). They are " 'to be compared, harmonized if possible, and, if not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.' "[1] *Id.* (citation omitted).

To begin with, chapter IX of the Code of Criminal Procedure provides the general rules for sentencing, including how to calculate the appropriate minimum and maximum terms under Michigan's indeterminate sentencing scheme. Maximum sentences are governed partly by MCL 769.8(1), which provides that the maximum sentence for an offender's first felony offense punishable by imprisonment in a state prison shall be the "maximum penalty provided by law . . . in all cases except as provided in this chapter [of the Code of Criminal Procedure]." The maximum sentences for drug offenses are provided in the controlled substances act. Minimum sentences are governed by MCL 769.34(2), which clearly requires that the minimum of every sentence be set in accordance with the Code of Criminal Procedure. It states that the minimum sentence for any felony included in part 2 of the sentencing guidelines, MCL 777.11 *et seq*., "shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed," except "as otherwise provided" in

[1] The members of this Court have expressed differing views regarding the proper approach to statutory interpretation. Although the current justices have disagreed on certain principles of statutory interpretation, there is agreement on the point that statutes should be construed in light of and in harmony with other relevant statutory provisions. See, e.g., *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008); *Baraga Co v State Tax Comm*, 466 Mich 264, 275 n 6; 645 NW2d 13 (2002).

MCL 769.34(2) or (3).[2] The sentencing guidelines are contained in chapter XVII of the Code of Criminal Procedure and provide the means of calculating minimum sentence ranges. The Code of Criminal Procedure also includes instructions about when the upper limit of those ranges may be enhanced. See MCL 769.34(2); MCL 777.1 *et seq*. The controlled substances act also provides mandatory minimum sentences for some drug offenses, but the Code of Criminal Procedure provides specific instructions about how to calculate minimum sentences when another statute provides for a mandatory minimum sentence.[3] In sum, for every felony to which chapter IX applies, the minimum sentence must be within the range calculated under the sentencing guidelines in chapter XVII of the Code of Criminal Procedure, and every maximum sentence must be the maximum provided by law.

In addition to the sentences generally permitted for offenses, both the Code of Criminal Procedure and the controlled substances act permit the sentences otherwise authorized to be enhanced for defendants who were convicted of prior offenses. The habitual-offender statutes in the Code of Criminal Procedure, MCL 769.10, 769.11, and 769.12, permit the maximum sentence otherwise allowed to be increased on the basis of the number of previous offenses. In addition, the controlled substances act provides in MCL 333.7413(2) that

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[2] MCL 769.34(2) provides an exception in circumstances in which a statute mandates a minimum sentence or a judge expressly departs from the guidelines by following the procedure outlined in MCL 769.34(3).

[3] MCL 769.9(3) provides that for major controlled substance offenses that have a mandatory minimum sentence, the court "shall fix the length of both the minimum and maximum sentence within those specified limits, . . . and the sentence so imposed shall be considered an indeterminate sentence." In addition, MCL 769.34(2)(a) provides that "[i]mposing a mandatory minimum sentence is not a departure [from the sentencing guidelines] under this section."

a person convicted of a subsequent drug offense "may be imprisoned for a term not more than twice the term otherwise authorized . . . ." The sentencing guidelines expressly incorporate MCL 333.7413(2) by listing that statutory provision in MCL 777.18 along with other statutory sections dealing with offenses that are based on an offender's other crimes. The sentencing guidelines instruct that in order to calculate a minimum sentence for a violation listed in MCL 777.18, the trial court should score the offense variables and determine the offense class on the basis of the underlying offense. MCL 777.21(4)(a) and (b).

III. THE PROPER INTERPRETATION OF MCL 333.7413(2)

The issue in this case arises in light of the enhancement statute in the controlled substances act, MCL 333.7413(2). Defendant was subject to a sentence enhancement under this provision, which provides that, excluding some circumstances not applicable here, "an individual convicted of a second or subsequent offense under [the controlled substances act] may be imprisoned for a term not more than twice the term otherwise authorized . . . ." The majority concludes that the "term otherwise authorized" must refer to the "period of time" between the minimum and maximum sentences, so that MCL 333.7413(2) allows the doubling of both the minimum and maximum sentences otherwise authorized, regardless of where in the statutory scheme the sentences are authorized. The majority therefore upholds the doubling of the minimum sentence authorized by the sentencing guidelines for defendant.

There is, however, a fundamental problem with this approach that the majority fails to address. The majority's interpretation creates a potential conflict between the sentence enhancement provision of the controlled

substances act, MCL 333.7413(2), and the requirement of the Code of Criminal Procedure in MCL 769.34(2) that all minimum sentences for applicable felonies *must* fall within the range calculated under the sentencing guidelines. The sentencing statutes in the Code of Criminal Procedure apply in this case. MCL 769.34(2) provides that every minimum sentence for a felony listed in MCL 777.11 *et seq*. *must* fall within the range permitted by the sentencing guidelines, except for certain circumstances provided for in MCL 769.34(2) and (3) that do not apply here.[4] Defendant pleaded guilty of possession of methamphetamine under MCL 333.7403(2)(b)(*i*), which is "a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00, or both." That offense is listed in MCL 777.13m and, therefore, under MCL 769.34(2), the minimum sentence defendant receives must fall within the range calculated under the sentencing guidelines in chapter XVII. I can see no authority under chapter IX that would exempt defendant from the requirement that the minimum sentence for his offense be within the range calculated under the sentencing guidelines. In my judgment, this is in conflict with the majority's conclusion that MCL 333.7413(2) could be read to authorize the doubling of the minimum sentence allowed by the sentencing guidelines, given that doing so could result in a minimum sentence that is not within the range provided by the guidelines.

As discussed below, I disagree with the majority's interpretation of the statute. But even if one accepts the majority's reading of MCL 333.7413(2) as correct when

[4] MCL 769.34(2)(a) does not apply because the statute under which defendant was sentenced, MCL 333.7403(2)(b)(*i*), does not specify a mandatory minimum sentence. MCL 769.34(3) does not apply because the sentencing judge did not follow the procedure required to depart from the guidelines.

read in isolation, I think that the provision still must be read in harmony with MCL 769.34(2). Because MCL 769.34(2) uses mandatory language ("the minimum sentence . . . *shall* be within the appropriate sentence range"), while the language in the controlled substances act, MCL 333.7413(2), is merely permissive ("an individual . . . *may* be imprisoned for a term not more than twice the term otherwise authorized"), if the majority's interpretation of MCL 333.7413(2) were correct, I would still interpret MCL 769.34(2) as limiting MCL 333.7413(2).[5] In my judgment, if the statutes are not harmonized in this manner, the majority's reading of MCL 333.7413(2) irreconcilably conflicts with MCL 769.34(2).[6]

I do not find it necessary to reach this somewhat

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[5] Even if the statutes could not be read harmoniously, in *Wayne Co*, this Court stated that if statutes were " 'not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.' " *Wayne Co*, 250 Mich at 234 (citation omitted). Given that the controlled substances act, including MCL 333.7413(2), predated the sentencing guidelines and the current version of MCL 769.34(2) by 20 years, reading the mandatory language in MCL 769.34(2) to limit MCL 333.7413(2) would be consistent with the "evident intent of the latest enactment" in the sentencing scheme of the Code of Criminal Procedure.

[6] The majority argues that, because generally "the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation," the Legislature must have intended the reference to "term" in MCL 333.7413(2) to include the new minimum sentencing guidelines. *Ante* at 729 (quotation marks omitted). While this reading could harmonize MCL 333.7413(2) with the sentencing guidelines in a general sense, it does not address the express conflict between MCL 333.7413(2) and the mandatory language in MCL 769.34(2) that the minimum sentence *must* fall within the sentencing range provided in the sentencing guidelines. If the Legislature had merely stated that the minimum term must be within the range "provided by law," as stated in MCL 769.8(1) with regard to the maximum term, this conflict would not exist. Instead, however, the Legislature specifically stated that the minimum sentence must fall within the range provided in the guidelines.

strained approach to reconciling the statutes, however, because I disagree with the majority's interpretation of MCL 333.7413(2). I think that, in the context of the statutory scheme as a whole, the better interpretation of MCL 333.7413(2) is that it only permits the doubling of the penalties provided in the controlled substances act and not the minimum sentencing ranges provided in the Code of Criminal Procedure.

In order to reach what I believe is the proper interpretation of MCL 333.7413(2), it is useful to consider the history of that provision. When the controlled substances act was adopted into law in 1978, there were no statutory sentencing guidelines and no statutorily required minimum sentences for most offenses. See *People v Primer*, 444 Mich 269, 278 n 11; 506 NW2d 839 (1993) (CAVANAGH, J., dissenting). To the extent that statutorily provided minimum sentences existed for drug offenses, they were provided within the controlled substances act itself, and the minimum sentences were mandatory. *Id*. In other words, at the time that MCL 333.7413(2) became law, the only "otherwise authorized" terms to which MCL 333.7413(2) could have been referring were those maximum sentences and, for a few

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The majority further argues that the instructions in MCL 777.21(4) for calculating minimum sentences under MCL 333.7413(2) suggest that "the Legislature intended for the recidivist aspect of the subsequent drug offense to be accounted for by enhancing both the defendant's minimum and maximum sentences pursuant to [MCL 333.7413(2)]." *Ante* at 730-731. I disagree. I suggest, as an alternative, that the Legislature's provision of instructions in the sentencing guidelines for how to calculate minimum sentences for offenses under MCL 333.7413(2) merely demonstrates that the Legislature intended minimum sentences for repeat drug offenders to be calculated under the sentencing guidelines. Nevertheless, I agree with the majority that "MCL 777.21(4) simply provides the methodology for a trial court to follow in calculating a defendant's minimum sentence guideline range" and does not provide dispositive support for either of our positions. *Ante* at 728.

offenses, mandatory minimum sentences provided in the controlled substances act. It is clear that at that time, the Legislature anticipated that the controlled substances act would need to be construed in conjunction with the sentencing statutes in the Code of Criminal Procedure because the Legislature expressly attempted to reconcile the Code of Criminal Procedure's habitual-offender-enhancement statutes, MCL 769.10, 769.11, and 769.12, with the controlled substances act.[7] Therefore, when MCL 333.7413(2) was adopted, it could have been read to permit courts to double the maximum and minimum sentences when the controlled substances act mandated both, but to permit courts to double only the maximum sentence when the controlled substances act provided only a maximum.[8]

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[7] Each of the habitual-offender statutes states that "[i]f the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461." MCL 769.10(1)(c), 769.11(1)(c), and 769.12(1)(c).

[8] For drug offenses that the controlled substances act provides mandatory minimums for, which are generally the major controlled substance offenses, it may be arguable whether MCL 333.7413(2) would permit doubling of the minimums as well as the maximums. The history of the relationship between the habitual-offender statutes and mandatory minimums is explained in *Primer*, 444 Mich at 278 n 11 (CAVANAGH, J. dissenting):

> "1978 PA 77, which first 'excluded' major controlled substance offenses from the purview of the habitual offender provisions, did not take effect unless and until 1977 HB 4190 was also enacted. See 1978 PA 77, § 2. HB 4190 was eventually enacted into law as 1978 PA 147. See 1978 PA 77 (compiler's note). 1978 PA 147 amended the Controlled Substances Act to provide for the first time mandatory minimum terms of imprisonment for certain drug-related offenses. The definition of 'major controlled substance offense' in the Code of Criminal Procedure corresponded to the offenses for which the Legislature had in the Controlled Substances Act mandated minimum terms of imprisonment." [Citation omitted.]

Twenty years later, in 1998, the Legislature first adopted statutory sentencing guidelines and amended the relevant sentencing provisions in the Code of Criminal Procedure accordingly. It was only then that the potential conflict between MCL 333.7413(2) and MCL 769.34(2) arose. As noted, where the new sentencing guidelines directly conflicted with the controlled substances act, i.e., where the controlled substances act provided mandatory minimums, the Legislature expressly reconciled the provisions. The Legislature did not, however, expressly address how to reconcile MCL 333.7413(2) with the newly created sentencing guidelines,[9] and it therefore falls to this Court to harmonize those provisions in light of the statutory scheme as a whole, if possible.

When considered in this context, the sentencing provisions in the Code of Criminal Procedure that were enacted 20 years later, when the sentencing guidelines themselves were adopted, are not inconsistent with

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It may be arguable whether MCL 769.10(1)(c), 769.11(1)(c), and 769.12(1)(c) were intended to permit the mandatory minimums to be doubled, as well as the maximums, given that the habitual-offender statutes themselves otherwise deal with maximum sentences. In light of this history, however, it seems possible that the Legislature intended MCL 333.7413(2) to permit courts to double both the maximum and the minimum when the controlled substances act mandated both. It is further arguable whether the sentencing guidelines would act as a limit on this authority today. In any event, it is not necessary to reach this issue in this case because the statute under which defendant was convicted and sentenced does not provide a mandatory minimum and is not a "major controlled substance offense," as defined in MCL 761.2. Therefore MCL 769.10(1)(c), 769.11(1)(c), and 769.12(1)(c) are not applicable in this case.

[9] This could be because the Legislature did not consider the provisions to conflict, if the Legislature was operating under the assumption that MCL 333.7413(2) only applied to, as it had up until that point, the mandatory minimum and maximum sentences provided in the controlled substances act.

MCL 333.7413(2). The plain text of MCL 769.34(2) makes clear that the Legislature contemplated that, for all sentences to which the guidelines applied, the minimum sentence should be calculated according to the sentencing guidelines. This intent is not inconsistent with MCL 333.7413(2) if that provision is read to refer only to, as it did before the enactment of the sentencing guidelines, the maximum, and perhaps minimum, penalties expressly provided in the controlled substances act.[10]

Therefore, in order to harmonize the provisions and read the text in light of the statutory scheme as a whole, I would hold that, under MCL 769.34(2), a repeat drug offender's minimum sentence must be calculated (and enhanced) using the sentencing guidelines, as provided in the sentencing statutes in chapters IX and XVII of the Code of Criminal Procedure. I would hold that, to the extent that it is applicable in a given case, MCL 333.7413(2) may only be used to enhance the penalties

[10] Using impressive linguistic gymnastics, the majority concludes that the best understanding of MCL 333.7413(2) is that the "term otherwise authorized" is not "exclusively the minimum sentence *or* the maximum sentence, but it is the actual indeterminate sentence, which is defined by both the minimum and maximum limits for that sentence." *Ante* at 724. I agree that this is one possible meaning of the phrase. But there are other possible meanings that I find more plausible in the context of the entire statutory sentencing scheme, particularly given that this provision was enacted 20 years before the Legislature enacted statutory sentencing guidelines within the indeterminate sentencing scheme. Indeed, throughout the statutory scheme, the Legislature refers to a "term" as the maximum (or minimum) amount of time for which an offender may be imprisoned. See, e.g., MCL 333.7416(1)(a) and (3); MCL 333.16177(2)(b). If the Legislature had intended to encompass both the maximum and minimum terms otherwise authorized in the controlled substances act, it is logical that the unmodified word "term" would be used in order to be applicable to both. I do not think that the majority's limited and exclusive understanding of the word "term" best harmonizes MCL 333.7413(2) with the statutory scheme as a whole.

provided in the controlled substances act. Therefore, in this case, I would hold that it was improper to find that MCL 333.7413(2) authorized the sentencing court to double defendant's minimum sentence.

IV. CONCLUSION

In my judgment, the majority improperly interprets the words and provisions of MCL 333.7413(2) outside the context of the statutory scheme and achieves an understanding of the statute that is inconsistent with the law as a whole. Therefore, I respectfully dissent. I would reverse the judgment of the Court of Appeals and remand the case to the trial court for resentencing.

KELLY, C.J., concurred with CAVANAGH, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Summary Disposition July 28, 2009:

SYMONS v PRODINGER, No. 137768. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we reinstate the Calhoun Circuit Court's order denying defendant Dr. Robert Prodinger's motion for judgment notwithstanding the verdict. The trial court instructed the jury that its decision as to defendant Dale Russell's negligence would also determine Dr. Prodinger's responsibility. Because Dr. Prodinger failed to object to that jury instruction, he cannot now disclaim vicarious liability for Russell's negligence. Although the plaintiff did not plead a cause of action based on vicarious liability against Dr. Prodinger in the complaint, the Court of Appeals dissent correctly noted that under MCR 2.118(C)(1), issues that are tried by express or implied consent of the parties, even though they are not raised in the pleadings, are treated as if they had been raised in the pleadings. Court of Appeals No. 269663.

Appeal Dismissed July 28, 2009:

SMITH v ANSARA RESTAURANT GROUP, INC, No. 137164. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 283826.

Leave to Appeal Denied July 28, 2009:

SYMONS v PRODINGER, No. 137967; Court of Appeals No. 269663.

In re WILLIAMS (DEPARTMENT OF HUMAN RESOURCES v SMITH), No. 138949; Court of Appeals No. 288028.

In re KCS (STRAUB v HELMUTH), No. 139163; Court of Appeals No. 288824.

SALEM TOWNSHIP v SALEM SPRINGS, LLC, No. 139278; Court of Appeals No. 292680.

Leave to Appeal Denied July 31, 2009:

VON ARX v LIVONIA FAMILY PHYSICIANS, PC, No. 136868. By order of October 27, 2008, the application for leave to appeal the June 3, 2008, judgment of the Court of Appeals was held in abeyance pending the

decision in *Vanslembrouck v Halperin* (Docket No. 135893). On order of the Court, the order denying the application for leave to appeal in *Vanslembrouck* having been issued on April 24, 2009, 483 Mich 965 (2009), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 268516.

MARKMAN, J. (*dissenting*). I would grant leave to appeal for the reasons set forth in Justice CORRIGAN's dissenting statement in *Vanslembrouck v Halperin*, 483 Mich 965 (2009).

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

PERNELL v ALLSTATE INSURANCE COMPANY, Nos. 138417 and 138418; Court of Appeals Nos. 279825 and 279837.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether the Court of Appeals properly extended *Darnell v Auto-Owners Ins Co*, 142 Mich App 1 (1985), to hold defendant liable for plaintiff's personal protection insurance benefits after defendant began paying those benefits, but then ceased after determining that another insurer had priority. Because *Darnell*, *supra* at 12, considered a priority dispute in the context of determining liability for *attorney fees* pursuant to MCL 500.3148, I question its relevance in determining liability for actual *benefits*.

In re WELLONS (DEPARTMENT OF HUMAN SERVICES v WELLONS), Nos. 139199 and 139266; Court of Appeals Nos. 288649 and 288648.

Reconsideration Granted July 31, 2009:

UNIVERSITY OF MICHIGAN REGENTS v TITAN INSURANCE COMPANY, No. 136905. On order of the Court, the motion for reconsideration of this Court's November 26, 2008, order is considered, and it is granted. We vacate our order dated November 26, 2008. On reconsideration, the application for leave to appeal the June 5, 2008, judgment of the Court of Appeals is considered, and it is granted. The parties shall include among the issues to be briefed whether *Liptow v State Farm Mut Automobile Ins Co*, 272 Mich App 544 (2006), and *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006), were correctly decided. Court of Appeals No. 276710.

WEAVER, J. (*concurring*). I concur fully in the order granting reconsideration and leave to appeal in this case. I write separately to respond to the dissent's statements regarding the decision to grant reconsideration in this case.

The dissent erroneously asserts that the justices voting to grant reconsideration do so improperly. The dissent cites *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), for the proposition that this Court is precluded from granting rehearing or reconsideration when the composition of the Court has changed, absent any new arguments from the parties in the case. However, contrary to the dissent's assertions, this Court merely stated in *Peoples* that a change in the composition of this Court cannot be the *basis* for granting rehearing or reconsideration.

As such, if the composition of the Court changes, and the composition becomes such that a majority of the Court sees a reason to grant reconsideration, the majority is not precluded from granting reconsideration. If, for instance, four justices on the newly composed Court conclude that the challenged decision was erroneous, those justices can vote to grant reconsideration. The same holds true whether the deciding vote is a new justice who joined the Court after the challenged decision was released or whether the deciding vote comes from a justice who voted for the challenged decision and changed his or her mind after further consideration.

This practice is consistent with MCR 2.119(F)(3), which creates a "palpable error" standard for rehearing and reconsidering cases. It is up to the moving party to show palpable error that would lead to a different disposition in the case. If a majority of the Court is convinced by the moving party, the Court has the discretion to grant rehearing or reconsideration. Furthermore, while MCR 2.119(F)(3) states that a motion for reconsideration generally will not be granted if the motion only presents the same issues decided in the original disposition of the case, MCR 2.119(F)(3) explicitly refrains from "restricting the discretion of the court" to grant reconsideration.

Accordingly, I concur in the order to grant reconsideration and leave to appeal.

YOUNG, J. (*dissenting*). I dissent from the order granting plaintiffs' motion for reconsideration in this case. Since the 19th century, "this Court has adhered to the principle that a motion for rehearing should be denied *unless* a party has raised an issue of fact or law that was not previously considered but which may affect the outcome."[1] We codified this judicial practice in MCR 2.119(F)(3):

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

In this case, plaintiffs have not raised any new issues that may properly be considered by this Court. Just as in their original application for leave to appeal, plaintiffs contend that MCL 600.5821(4), which exempts the state and its political subdivisions from the effect of statutes of limitations when seeking recovery of certain costs, precludes the application of the no-fault act's one-year-back rule, MCL 500.3145(1).

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[1] *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 28 (2009) (*USF&G*) (YOUNG, J., dissenting), citing *Nichols, Shepard & Co v Marsh*, 62 Mich 439, 440 (1886), and *Thompson v Jarvis*, 40 Mich 526, 526 (1879).

Accordingly, plaintiffs continue to ask this Court to hold that *Cameron v Auto Club Ins Ass'n*[2] was wrongly decided and to overrule *Liptow v State Farm Mut Automobile Ins Co*.[3]

The only new issue raised by plaintiffs in their motion for reconsideration is a policy-based argument regarding the economic effect of the Court's order given the state's current fiscal crisis. However, this Court is neither constitutionally permitted nor institutionally equipped to conduct a cost-benefit analysis of statutes enacted by elected legislators in the democratic political process.[4] Were we to do so, we would cross the line into the legislative sphere in violation of the separation of powers.[5]

The concurring statement of Justice WEAVER mischaracterizes the error analysis of MCR 2.119(F)(3). Under this rule, the Court may grant rehearing or reconsideration only when there is " 'a palpable error *by which the court and the parties have been misled*.' "[6] Plaintiffs have not raised any new legal arguments in their motion for reconsideration. Rather, plaintiffs focus solely on the economic effect of the statutes, a policy-based argument that cannot amount to palpable error. Plaintiffs have cited nothing more than their disagreement with prior courts' application of the plain language of the relevant statutes, plain language which could not mislead either the parties or this Court.

There *is* one significant change since our November 26, 2008, denial of leave: the composition of this Court. Justice HATHAWAY unseated former Chief Justice TAYLOR in the 2008 election and took office on January 1, 2009, thereby shifting the philosophical balance on the Court. There is no palpable error, but there is a new philosophical majority.

Over a century ago, the justices of this Court wisely realized that such a change is not a proper ground for reconsideration.[7] By circumventing this principle, the new philosophical majority has *sub silentio* overruled that long venerated precedent. In the short time since the composition of this Court changed, those in the majority have exhibited a lack of judicial restraint in acting upon prior orders and opinions of this Court with which they disagree. They have taken this tack despite their prior professed beliefs that the composition of the Court should not control its

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[2] 476 Mich 55 (2006).

[3] 272 Mich App 544 (2006).

[4] It is a well established principle that "policy decisions are properly left for the people's elected representatives in the Legislature." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589 (2005).

[5] *Id.* at 591.

[6] See *USF&G*, 484 Mich at 28 n 6 (YOUNG, J., dissenting) (citation omitted).

[7] *Peoples v Evening News Ass'n*, 51 Mich 11 (1883); see also *USF&G*, 484 Mich at 28 (YOUNG, J., dissenting).

decisions.[8] Indeed, then-Justice KELLY and Justices CAVANAGH and WEAVER all dissented from this Court's prior order denying leave to appeal in this case.[9] Thus, this Court's order granting reconsideration is nothing more than the new majority seizing upon this motion to vindicate some of its members' dissents. The "judicial restraint" and principles lauded previously by members of the new majority should not depend on the composition of the Court.

I respectfully dissent.

CORRIGAN, J. I join the statement of Justice YOUNG.

Reconsideration Denied July 31, 2009:

GENESEE FOODS SERVICES, INC v MEADOWBROOK, INC, No. 137526. Leave to appeal denied at 483 Mich 901. Reported below: 279 Mich App 649.

CORRIGAN, J. I would grant the motion for reconsideration.

MARKMAN, J. (*dissenting*). I would grant the motion for reconsideration and reverse the Court of Appeals for the reasons set forth in both the dissenting statements of Justice CORRIGAN and myself to this Court's original order. *Genesee Food Services, Inc v Meadowbrook, Inc*, 483 Mich 907, 909, 910 (2009).

Summary Disposition August 6, 2009:

PEOPLE v DOWDY, No. 138351. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 287689.

KELLY, C.J. (*concurring*). I concur in this Court's order remanding the case to the Court of Appeals for consideration as on leave granted because there is no published caselaw governing the unusual factual circumstances presented. Justice YOUNG generously puts forth a blueprint showing how the Court of Appeals could decide the matter. But, I question whether the pertinent section of the Sex Offenders Registration Act[1] (SORA) can be applied to defendant given that he was unable to register a residence. A person cannot be criminally liable for failing to do

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[8] See, e.g., *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 256 (2007) (KELLY, J., dissenting) ("What has changed in that decade to warrant a complete reversal in this law? There is but one answer, the makeup of the Court. The law has not changed. Only the individuals wearing the robes have changed."); *Paige v Sterling Hts*, 476 Mich 495, 532-533 (2006) (CAVANAGH, J., dissenting) ("The only change has been the composition of this Court. And unfortunately, this is the only reasonable answer to the question why a decision from this Court decided just eight years earlier and involving the same issue is now being overruled."). See also *USF&G*, 484 Mich at 29-30 (YOUNG, J., dissenting), for further examples of the new majority's prior inconsistent protestations.

[9] *Univ of Michigan Regents v Titan Ins Co*, 482 Mich 1074 (2008).

[1] MCL 28.721 *et seq*.

an act that he or she is incapable of performing.[2] Therefore, it appears that the circuit court may have properly dismissed the charges against defendant.

Defendant was convicted of crimes that required him to register and report under SORA. Upon his release from prison, he resided at the Volunteers of America (VOA) shelter in Lansing. He properly registered the VOA shelter address through the Department of Corrections before his release from prison.[3] After living at the VOA for about four years, defendant was told that he could no longer stay there because of the shelter's policy to refuse services to convicted sex offenders.

Because defendant registered no other address, he was charged with four counts of violating SORA: (1) one count of failing to register (a felony),[4] (2) two counts of failing to comply with reporting duties (a misdemeanor),[5] and (3) one count of refusing or failing to pay a registration fee (a misdemeanor).[6] The district court bound him over for

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[2] *Port Huron v Jenkinson*, 77 Mich 414, 419 (1889); see also *United States v Dalton*, 960 F2d 121 (CA 10, 1992); *United States v Spingola*, 464 F2d 909 (CA 7, 1972).

[3] Justice YOUNG is incorrect that defendant "falsely provided the address of the soup kitchen where he ate meals but did not reside." Defendant resided at the VOA shelter for four years after being released from prison, until he was told he could longer stay there. The prosecutor has clearly stated in his brief before this Court and the Court of Appeals that defendant resided at the VOA. The lower court record supports this. For example, a VOA employee testified that defendant received services at the shelter until they discovered he was a registered sex offender, at which point he "no longer stayed at the VOA." As another example: the district court stated that defendant had until December 10 to report his new address. SORA gives a defendant 10 days to register a change of address. Defendant was required to leave the VOA at some time in November. The December 10 date is meaningless unless defendant was residing at the VOA 10 days before then. The district court based the December 10 date on an assumption that defendant left his VOA residence on the last day of November. All the parties in this case were operating under the assumption that defendant resided at the VOA until November 2006.

Defendant did not "initially register[]" a false address. He was charged in this case because the VOA address, which was at one time valid for SORA purposes, ceased to be his residence in November 2006 and he failed to register a *new* address.

[4] MCL 28.729(1)(a).

[5] MCL 28.729(2)(a).

[6] MCL 28.729(4). Defendant was charged with this misdemeanor even though the registration fee is waived if an individual is indigent. MCL

trial as charged. The circuit court determined that it was impossible for defendant to comply with the SORA requirements and dismissed the charges. Because all four charges against defendant have a willfulness requirement, he cannot be guilty of any of them unless he acted willfully.

The pertinent provision of SORA is MCL 28.725(1). It reads:

> An individual required to be registered under this act shall notify the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located or the department post of the individual's new residence or domicile within 10 days after the individual changes or vacates his or her residence, domicile, or place of work or education, including any change required to be reported under [MCL 28.724(a)].

The felony charge against defendant is premised on the fact that he failed to register a new residence. SORA defines residence as "that place at which a person *habitually sleeps*, keeps his or her personal effects, *and has a regular place of lodging*."[7] It does not appear that the defendant had a new residence to register once the VOA required him to leave the shelter. Underpasses and park benches may be the places where defendant "habitually sleeps," but they hardly qualify as a "regular place of lodging" under the statute.

It seems unreasonable to interpret the statute to require that a homeless person register wherever his or her cardboard box happens to be set up for the night.[8] City street corners fail to meet the statutory definition of residence. First, a defendant must *habitually* sleep somewhere for it to be a residence.[9] For something to be habitual, it must be more than a random occurrence or event.[10] Second, a place must be a *regular place of lodging* to qualify as a residence. Again, defendant does

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28.725b. Justice YOUNG claims that the charges brought against defendant are premised on the fact that he did not comply with the quarterly reporting requirements of SORA. This is only partially accurate. Two of the charges are for failure to report. The felony charge of failing to register a change in address and the misdemeanor charge concerning the fee have nothing to do with the quarterly reporting requirements.

[7] MCL 28.722(g) (emphasis added).

[8] Indeed, during the preliminary examination the prosecutor argued that "[i]t's the People's position that [defendant] has an obligation . . . [to register] if he is staying on MLK and Holmes in a cardboard box . . . . And if that changes every day, then he's under obligation to go every day and to tell them where he's going to be."

[9] MCL 28.722(g).

[10] A habit is (1) "an acquired pattern of behavior that has become almost involuntary as a result of frequent repetition," (2) "customary practice or use," or (3) "a particular practice, custom, or usage." *Random House Webster's College Dictionary* (2001).

not have a regular place of lodging if he is nomadically moving around the city depending on the weather, availability of food, shelter, and other resources.

Moreover, SORA prohibits a defendant from registering an address that is not his or her true residence.[11] A defendant cannot register a place as his or her residence unless that place qualifies as a residence under the act. Defendant in this case would have violated the act by registering an address, such as a temporary park bench, because a temporary park bench does not meet the statutory requirement for a residence. Justice YOUNG's interpretation of the statute creates a Catch-22 situation, which would force defendant either to report a false residence and violate SORA, or do nothing and violate SORA. Either way, it is impossible for him to comply with the statute.

A defendant should not be excused from SORA requirements for willfully avoiding the registration requirement by failing to establish a residence. However, a defendant cannot be held to violate the act where he cannot comply. Even if defendant in this case had registered "Greater Lansing Area" with the police, this would not satisfy the residency requirements of SORA. He simply had no residence to register. And nothing indicates that he failed to establish a residence, shuffling from park bench to highway to underpass to cardboard box, in an attempt to avoid the registration requirements of SORA.

Therefore, I believe that the circuit court may have correctly dismissed the charges against defendant because it was impossible for him to comply with SORA.

YOUNG, J. (*concurring*). I concur in this Court's order remanding this case to the Court of Appeals for consideration as on leave granted. I write separately to express my belief that the circuit court erred in dismissing the various charges brought against defendant. Contrary to the expostulations of Chief Justice KELLY and Justice HATHAWAY, defendant was not charged with violating the Sex Offenders Registration Act (SORA)[1] because he is homeless or lacks a permanent residence. Rather, the criminal charges lodged against defendant are premised upon the fact that he made absolutely *no effort* to comply with the quarterly reporting requirements of the SORA for three years.

Defendant is a convicted sex offender who has been homeless since his release from prison in 2002. When defendant initially registered under SORA, he falsely provided the address of the soup kitchen where he ate meals but did not reside. Defendant last reported this address in 2003, and has not reported or updated his address since.[2]

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[11] MCL 28.727(6).

[1] MCL 28.721 *et seq*.

[2] Contrary to the concurring statement of Chief Justice KELLY and the dissenting statement of Justice HATHAWAY, there is no evidence in the record that defendant ever resided at the Volunteers of America (VOA) address he initially provided to local law enforcement. Rather, a VOA employee testified at the preliminary examination that defendant uti-

Defendant was charged with one felony count and three misdemeanor counts relating to his failure to report in person to a local law enforcement agency on a quarterly basis, to update his residence information, and his failure to pay a reporting fee in violation of SORA. The district court bound defendant over for trial as charged. The circuit court dismissed the charges because it could not "see how a homeless person" "with no place to go" could "comply with the terms of the act." The prosecution appealed to the Court of Appeals, which denied leave to appeal.

I believe that the circuit court erred in dismissing the charges against defendant. MCL 28.725a(3) and (4)[3] require a convicted sex offender to report to the local law enforcement agency in the county in which he "is domiciled or resides"[4] on a quarterly basis. These provisions require the

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lized the agency's services "mostly for meals" until the agency discovered that defendant was a sex offender. While Chief Justice KELLY would prefer that the record read otherwise, the employee categorically did not testify that defendant "resided at the VOA shelter for four years." If defendant registered the address, but did not habitually sleep there, then he provided false or misleading information about his residence. Accordingly, it appears from the record that defendant has never been in compliance with MCL 28.725a(3) and (4).

[3] At all relevant times, these provisions provided:

> (3) . . . [A]n individual registered under this act who is not incarcerated shall report in person to the local law enforcement agency or sheriff's department having jurisdiction where he or she is domiciled or resides or to the department post in or nearest to the county where he or she is domiciled or resides. The individual shall present proof of domicile or residence and update any information that changed since registration, including information that is required to be reported under [MCL 28.724a]. An individual registered under this act who is incarcerated . . . shall report under this subsection not less than 10 days after he or she is released.
>
> (4) . . . [F]ollowing initial verification under subsection (3), . . . an individual required to be registered under this act who is not incarcerated shall report in person to the local law enforcement agency or sheriff's department having jurisdiction where he or she is domiciled or resides or to the department post in or nearest to the county where he or she is domiciled or resides for verification of domicile or residence as follows: [various regular reporting dates for sex offenders convicted of certain crimes].

[4] SORA defines "residence" for "registration and voting purposes"

> as that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. . . . This

individual to provide proof of domicile or residence and update any information that must be provided by statute. MCL 28.725(1) further provides that upon changing or vacating a residence or domicile, the individual must notify the agency of the new residence or domicile within 10 days. The burden then shifts to the agency to verify the information provided.[5]

Certainly, there was nothing preventing defendant from complying with the reporting requirements of MCL 28.725a(3) and (4) and informing law enforcement of his current living arrangements. It is undisputed that defendant had not reported to *any* police agency since 2003. Contrary to Chief Justice KELLY's and Justice HATHAWAY's contentions, there is nothing "absurd" about the state's requirement that persons convicted of sexual crimes periodically inform the police of their living arrangements, even if they are homeless. The registration requirements of SORA "are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." MCL 28.721a. Law enforcement's knowledge that a homeless sexual offender is residing in a city park, an abandoned building,[6] or within 1000 feet of school property[7] undoubtedly provides the police with the ability to monitor predators and protect the public.

SORA requires a sex offender to provide proof of his residence or domicile, but does not identify any *exclusive* method of providing such proof. While defendant's homelessness may have provided unusual problems in *proving* his residence, the statute expressly contemplates atypical living arrangements, permitting the Department of State Police to specify other satisfactory means of proving proof of domicile or residence. MCL 28.725a(8) provides:

> An individual required to be registered under this act shall maintain either a valid operator's or chauffeur's license issued under the Michigan vehicle code . . . or an official state personal identification card . . . with the individual's current address. The license or card *may* be used as proof of domicile or residence under this section. In addition, the officer or authorized employee *may* require the individual to produce another document bearing his or

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> section shall not be construed to affect existing judicial interpretation of the term residence. [MCL 28.722(g).]

[5] MCL 28.725a(6). When defendant was initially released from prison, the substance of this provision was found in MCL 28.725a(5).

[6] Defendant's counsel represented that, since being released from prison, defendant has lived at "shelters, wherever, city parks, abandoned buildings, [or] places where people might let him stay for a day or two." Contrary to Justice HATHAWAY's recitation of the record, counsel did not indicate that defendant "wanders from place to place . . . every day or two."

[7] See MCL 28.733(f) and MCL 28.735.

her name and address, including, but not limited to, voter registration or a utility or other bill. *The department may specify other satisfactory proof of domicile or residence.* [Emphasis added.]

In the event that a sex offender reported to the local law enforcement agency and was truly unable to provide any of the statutorily enumerated documents to prove his residence or domicile, the duty would fall to the Department of State Police to devise some alternate verification method. Contrary to Justice KELLY's assertion, my interpretation of the statute does not "create[] a Catch-22 situation." A defendant is required to report in person to the local police and notify the police of his residence or domicile, wherever that may be. The burden then shifts to the law enforcement agency and the state police to decide how to verify the defendant's whereabouts for purposes of SORA.[8] I see nothing in SORA that authorizes the state to penalize a defendant merely for being homeless; rather, the statute penalizes the defendant's failure to report his residence or domicile with law enforcement. Accordingly, I concur in this Court's order remanding this case to the Court of Appeals for consideration as on leave granted.

CORRIGAN and MARKMAN, JJ. We join the statement of Justice YOUNG.

HATHAWAY, J. (*dissenting*). I would deny leave to appeal because I believe that the prosecutor failed to present sufficient evidence to bind defendant over for trial on the charges. The prosecutor claims on appeal that the trial court erred in dismissing the charges against defendant. Specifically, defendant was charged with the following four counts related to his alleged failure to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*.: (1) failure to inform authorities of a new address as required by MCL 28.725(1); (2) and (3) failure to verify an address quarterly in violation of MCL 28.725a; and (4) failure to pay the registration fee within 90 days of reporting, in violation of MCL 28.725a(7) or MCL 28.727(1).

In order to sustain any of the counts, the prosecution must demonstrate that, during the period alleged in the information, defendant had a residence or domicile as defined by the statute. See MCL 28.725(1); MCL 28.725a; MCL 28.727.[1] SORA defines "residence" as "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging." MCL 28.722(g). Though SORA does not define "domicile," the word is generally taken to mean a place where a

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[8] MCL 28.725a(8).

[1] The provisions relating to counts one through three expressly refer to the assumed existence of a residence or domicile. Without proving a residence or domicile, the prosecutor cannot establish a violation of the provisions. The provisions related to the registration fee in count four are tied to the registration and reporting requirements. See MCL 28.725a(7); MCL 28.727(1). Again, the registration and reporting requirements are premised on having a domicile or residence to report or register. Because the prosecutor failed to establish that defendant had a domicile or residence, defendant cannot be held to have violated the fee requirement.

person has his or her true, fixed, and permanent home and principal establishment, to which, whenever absent therefrom, he or she intends to return. See MCL 141.609(1); *Hartzler v Radeka*, 265 Mich 451, 452 (1933).

The entirety of the prosecutor's proofs consisted of allegations that defendant, a homeless person, registered his address as the Volunteers of America shelter upon being discharged from prison, then left the shelter in 2006 without registering or reporting a new address. It is not clear whether the prosecutor is alleging that defendant actually resided at the shelter during the relevant period or merely received services, such as food, at the shelter. Assuming that the prosecutor is alleging that defendant merely received services at the shelter and did not actually "reside" there as defined by the statute, the prosecutor has failed to establish that defendant had a residence or domicile during the relevant period. If the prosecutor cannot demonstrate the existence of a residence or domicile, all four charges against defendant must be dismissed because each is premised on having a residence or domicile.[2]

Assuming that the prosecution is alleging that defendant resided at the shelter during the relevant period, and thus was required to register and periodically report that address, it presents insufficient evidence on the matter. The manager of the shelter testified at the preliminary examination that defendant *received services* at the shelter until November 2006, when he was asked to leave. For his part, defendant maintains that, since his release from prison, he has been homeless and wanders from place to place—such as abandoned buildings, parks, and shelters—every day or two. Although it might well be stated that defendant "stayed" at the shelter in question for a period, such a bare assertion does not establish a domicile or residence under the statute. The prosecutor has the burden of presenting evidence on every element of the offense. The record evidence indicates that the prosecutor has failed to do so. The trial court recognized that the prosecution presented insufficient evidence of a residence or domicile as defined in the statute and dismissed the charges. The Court of Appeals denied leave, and I would as well.[3]

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[2] Whether defendant registered a false address when he registered the address of the homeless shelter in Lansing has no bearing on whether defendant committed the charged offenses. Even assuming that defendant registered a false address when he registered the address of the shelter, the prosecution cannot prove that defendant committed the charged acts without proving that he had a domicile or residence during the period in question.

[3] This is not to say that a homeless person by definition can never have a residence or domicile, only that the prosecution failed to prove that this particular defendant did. Furthermore, to hold that individuals who have no residence or domicile must abide by the requirement to register or report one's residence or domicile is an unlawful and absurd proposition. See *Port Huron v Jenkinson*, 77 Mich 414, 419 (1889) (stating that "[n]o legislative or municipal body has the power to impose the duty of

In closing, I note that the purpose of SORA is wise. Consequently, I would urge the Legislature to follow the lead of many other states in formulating a provision with which a homeless person who does not have a domicile or residence could readily comply.

Appeal Dismissed August 6, 2009:

DIXON v CHRYSLER LLC, No. 138101. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 286261.

Leave to Appeal Denied August 6, 2009:

PEOPLE v TRICE, No. 136763; Court of Appeals No. 284520.

PEOPLE v PANNELL, No. 136955. On order of the Court, the application for leave to appeal the July 3, 2008, order of the Court of Appeals is considered, and it is denied without prejudice to the defendant filing a request in the Wayne Circuit Court, pursuant to MCR 6.433(C)(3), for an order directing transcription of the October 27, 2000, hearing on the defendant's motion to quash, the November 29, 2000, hearing on the motion for severance, the January 17, 2001, hearing on the motion for trial counsel to withdraw, and the May 8, 2001, hearing on the motion for a change of venue. The circuit court shall order production of these transcripts, if it finds that the defendant has demonstrated good cause for doing so. In the event that the transcripts are prepared, the clerk must provide copies to the defendant. We do not retain jurisdiction. Court of Appeals No. 282407.

PEOPLE v TERRELL, No. 136992; Court of Appeals No. 285186.

PEOPLE v GILES, No. 137063; Court of Appeals No. 275207.

PEOPLE v MCCONNELL, No. 137157; Court of Appeals No. 284617.

PEOPLE v BISKNER, No. 137198; Court of Appeals No. 278006.

ATLANTIC NATIONAL TRUST, LLC v MIDWEST MACHINE TECHNOLOGIES, LLC, No. 137213; Court of Appeals No. 273083.

PEOPLE v DUCKETT, No. 137348; Court of Appeals No. 283792.

PEOPLE v CARTER, No. 137438; Court of Appeals No. 286188.

PEOPLE v GRIFFIN, No. 137494; Court of Appeals No. 282160.

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performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such duty a crime").

PEOPLE v ALEX LEWIS, No. 137603. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285159.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case because I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v BAL, No. 137669; Court of Appeals No. 280601.

PEOPLE v JOHNSON, No. 137694. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287060.

PEOPLE v LOVEJOY, No. 137783. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287719.

PEOPLE v GERALD HOWARD, No. 137817. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284153.

PEOPLE v OMAR GATES, No. 137819. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287542.

PEOPLE v THOMAS, No. 137833. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286226.

PEOPLE v NATHAN JONES, No. 137836. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285580.

PEOPLE v COOLEY, No. 137845; Court of Appeals No. 285743.

PEOPLE v MICHAEL CLARK, No. 137848. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285300.

PEOPLE v JAMES MOORE, No. 137850. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287613.

PEOPLE v TIMOTHY LEWIS, Nos. 137853 and 137854; Court of Appeals Nos. 277353 and 277355.

PEOPLE v YOUNG, No. 137861. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287538.

PEOPLE v WINGEART, No. 137862. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283378.

PEOPLE v DESMYTHER, No. 137869. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285262.

PEOPLE v MICHAEL MOORE, No. 137874. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287450.

PEOPLE v LEGRONE, No. 137881. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285465.

PEOPLE v BRADFORD, No. 137887. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288004.

PEOPLE v SMITH, No. 137892. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284459.

PEOPLE v GRAY, No. 137894. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286606.

PEOPLE v WELLS, No. 137897. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285058.

PEOPLE v LITTLETON, No. 137898. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284368.

PEOPLE v JOBEY HENDERSON, No. 137911; Court of Appeals No. 287753.

PEOPLE v CHRISTOPHER HOWARD, No. 137912. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283939.

PEOPLE v HANN, No. 137913; Court of Appeals No. 286812.

PEOPLE v CADOTTE, No. 137914. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286900.

PEOPLE v TYLER, No. 137917. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286282.

PEOPLE v RICHARDSON, No. 137923. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285554.

PEOPLE v BOLING, No. 137933. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285014.

PEOPLE v BOWMAN, No. 137936. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286761.

PEOPLE v MABEN, No. 137937. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285922.

PEOPLE v RIDDLE, No. 137938. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286403.

PEOPLE v SEVERE, No. 137942. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287347.

PEOPLE v SHAWVER, No. 137983. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284582.

PEOPLE v TAYLOR, No. 138000. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286184.

PEOPLE v PERRY, No. 138001; Court of Appeals No. 285017.

PEOPLE v MIDGETT, No. 138004; Court of Appeals No. 278952.

PEOPLE v KINT, No. 138013. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287853.

PEOPLE v IVANOVA, No. 138015. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287118.

PEOPLE v WHITE, No. 138025. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284484.

PEOPLE v PORTIS, No. 138038. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286108.

LAFOUNTAIN v DEPARTMENT OF CORRECTIONS, No. 138040; Court of Appeals No. 286996.

PEOPLE v SWAIN, No. 138049. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288133.

PEOPLE v HAY, No. 138051. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287454.

STANNY v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 138053; Court of Appeals No. 280916.

PEOPLE v FLOWERS, No. 138056; Court of Appeals No. 279219.

PEOPLE v SHARP, No. 138058. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286860.

PEOPLE v WOODS, No. 138063. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287863.

PEOPLE v NEELY, No. 138068. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286445.

PEOPLE v SIEBERT, No. 138081. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287629.

PEOPLE v MYERS, No. 138094. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285663.

PEOPLE v IRWIN, No. 138103. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287348.

PEOPLE v RYDER, No. 138106. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287785.

PEOPLE v EDWARDS, No. 138109. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287492.

PEOPLE v STAMPS, No. 138120. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288637.

PEOPLE v JUSTICE, No. 138133. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287709.

PEOPLE v WESTERFIELD, No. 138143. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288031.

PEOPLE v STANLEY DAVIS, No. 138150. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285989.

PEOPLE v VARY, No. 138152. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284110.

PEOPLE v PACE, No. 138166. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288543.

PEOPLE v SCOTT, No. 138174. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285595.

PEOPLE v HUDSON, No. 138178. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285111.

PEOPLE v WATERS, No. 138184. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288246.

PEOPLE v JENKINS, No. 138198. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287449.

PEOPLE v LEONARD CROSS, No. 138199. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288139.

PEOPLE v DENNIS, No. 138202. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287595.

PEOPLE v FORD, No. 138228; Court of Appeals No. 280087.

PEOPLE v ZIEGLER, No. 138229; Court of Appeals No. 278270.

PEOPLE v LAMBETH, No. 138230; Court of Appeals No. 278519.

PEOPLE v ALBERT CLARK, No. 138240. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287407.

PEOPLE v LOCKLEAR, No. 138250. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287820.

PEOPLE v CLAYTON, No. 138277; Court of Appeals No. 278460.

PEOPLE v HARRIGER, No. 138279. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286098.

PEOPLE v BROOKS, No. 138286. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 289519.

PEOPLE v MCQUIRTER, No. 138298. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287790.

PEOPLE v WATTS, No. 138305; Court of Appeals No. 280319.

PEOPLE v THOMPSON, No. 138318. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 288715.

PEOPLE v BETTS, No. 138344. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 289349.

AUXIER v NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, No. 138399; Court of Appeals No. 281793.

BRICKER v AUSABLE VALLEY COMMUNITY MENTAL HEALTH SERVICES, No. 138413; Court of Appeals No. 281736.

PEOPLE v GEE, No. 138419; Court of Appeals No. 281378.

GREEN TREE SERVICING, LLC v FUTERNICK, Nos. 138449 and 138450; Court of Appeals Nos. 274936 and 279215.

SCIO TOWNSHIP v BATESON, No. 138455; Court of Appeals No. 287567.

In re REINSTATEMENT PETITION OF MACK, No. 138486; ADB: 08-4-RP.

PEOPLE v KINSEY, No. 138490; Court of Appeals No. 281765.

PEOPLE v MURPHY, No. 138491; reported below 282 Mich App 571.

PEOPLE v SCHIMKE, No. 138495; Court of Appeals No. 289193.

PEOPLE v GREEN, No. 138514; Court of Appeals No. 279519.

MITCHELL v INGHAM CIRCUIT JUDGE, No. 138515; Court of Appeals No. 288679.

CLEMENCE v DEPARTMENT OF LABOR & ECONOMIC GROWTH, No. 138518; Court of Appeals No. 288229.

PEOPLE v MAGEE, No. 138519; Court of Appeals No. 277029.

ENGEL MANAGEMENT COMPANY, INC v FORD MOTOR CREDIT COMPANY, No. 138530; Court of Appeals No. 279868.

PEOPLE v MURRAY, No. 138533; Court of Appeals No. 281767.

JONES v DEPARTMENT OF CORRECTIONS, No. 138540; Court of Appeals No. 288226.

MANSKE v DEPARTMENT OF TREASURY, No. 138556; Court of Appeals No. 281988.

PEOPLE v HUBBARD, No. 138564; Court of Appeals No. 290021.

PEOPLE v CARICO, No. 138565; Court of Appeals No. 277973.

PEOPLE v PATTERSON, No. 138574; Court of Appeals No. 289420.

In re ESTATE OF DOSS (DOSS v DOSS), No. 138578; Court of Appeals No. 277982.

CITY OF PONTIAC v MICHIGAN ASSOCIATION OF POLICE, No. 138579; Court of Appeals No. 280919.

PEOPLE v MOTT, No. 138583; Court of Appeals No. 280671.

PEOPLE v WESTBROOK, No. 138588; Court of Appeals No. 282397.

GLOVER v PONTIAC HOUSING COMMISSION, No. 138590; Court of Appeals No. 281737.

PEOPLE v REED, No. 138591; Court of Appeals No. 280780.

PEOPLE v LANCE JONES, No. 138593; Court of Appeals No. 282242.

PEOPLE v VIRDEN, Nos. 138594, 138595, and 138596; Court of Appeals Nos. 281307, 281876, and 281877.

PEOPLE v BONDIE, No. 138600; Court of Appeals No. 289134.

PEOPLE v MOTLEY, No. 138607; Court of Appeals No. 280393.

TOWNSEND v KASLE STEEL CORPORATION, No. 138608; Court of Appeals No. 278645.

PEOPLE v STANLEY, No. 138611; Court of Appeals No. 276208.

PEOPLE v DYE, No. 138613; Court of Appeals No. 280645.

PEOPLE v DESHON MILLER, No. 138616; Court of Appeals No. 281466.

PEOPLE v O'BRIEN, No. 138624; Court of Appeals No. 289542.

SYROWATKA v WASHTENAW COUNTY, No. 138635; Court of Appeals No. 277336.

PEOPLE v GUEBARA, No. 138640; Court of Appeals No. 290068.

MEISNER & ASSOCIATES, PC v STAMPER & COMPANY, No. 138642; Court of Appeals No. 280190.

PEOPLE v PAROLE BOARD, No. 138643; Court of Appeals No. 288473.

PEOPLE v HANSON, No. 138645; Court of Appeals No. 280299.

PEOPLE v LAVERNE, No. 138647; Court of Appeals No. 281147.

BROWN v DEPARTMENT OF CORRECTIONS, No. 138648; Court of Appeals No. 289220.

RODRIGUEZ v MERCHANT, No. 138662; Court of Appeals No. 288495.

PEOPLE v GOMEZ, No. 138671; Court of Appeals No. 280808.

PEOPLE v GALLARDO, No. 138672; Court of Appeals No. 289904.

PEOPLE v IVERSON, No. 138675; Court of Appeals No. 290314.

PEOPLE v RONALD LEWIS, No. 138682; Court of Appeals No. 283091.

PEOPLE v ANTHONY GATES, No. 138686; Court of Appeals No. 283640.

PEOPLE v ATKINS, No. 138698; Court of Appeals No. 281377.

PEOPLE v MCALISTER, No. 138700; Court of Appeals No. 290455.

PEOPLE v CARPENTER, No. 138704; Court of Appeals No. 289798.

PEOPLE v KILMER, No. 138705; Court of Appeals No. 289935.

HARKNESS v GRIMM & KORNAK, No. 138706; Court of Appeals No. 288504.

HATHAWAY, J. (*not participating*). I recuse myself and will not be participating in this case because I have a close personal friendship with a defendant. See MCR 2.003(B).

PEOPLE v PILLARS, No. 138707; Court of Appeals No. 280812.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case because I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v STRAWTHER, No. 138708; Court of Appeals No. 282936.

SHELSON v SCHMIDT INDUSTRIES, INC, No. 138709; Court of Appeals No. 281123.

PEOPLE v ANDERSON, No. 138711; Court of Appeals No. 283131.

PEOPLE v WIGGINS, No. 138715; Court of Appeals No. 283158.

PEOPLE v MARQUEST HENDERSON, No. 138719; Court of Appeals No. 289388.

PEOPLE v ST ONGE, No. 138720; Court of Appeals No. 288237.

HAWKINS v DEPARTMENT OF CORRECTIONS, No. 138723; Court of Appeals No. 289953.

WARREN v DELPHI CORPORATION, No. 138734; Court of Appeals No. 289515.

PEOPLE v EAGLE, No. 138736; Court of Appeals No. 289917.

PEOPLE v ANTONIO HARRIS, No. 138738. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 290430.

PEOPLE v MCGEE, No. 138739; Court of Appeals No. 286881.

PEOPLE v BONNER, No. 138752; Court of Appeals No. 289360.

PEOPLE v EDWIN HALL, No. 138753; Court of Appeals No. 283217.

PEOPLE v JEFFERSON, No. 138754; Court of Appeals No. 283609.

PEOPLE v DUNBAR, No. 138755; Court of Appeals No. 281379.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case because I was the presiding trial judge. See MCR 2.003(B).

WULFEN v MONTMORENCY COUNTY, No. 138766; Court of Appeals No. 281930.

REED v OFFICER SITARSKI, Nos. 138767 and 138768, Court of Appeals Nos. 281041 and 281403.

PEOPLE v PERREO, No. 138773; Court of Appeals No. 283450.

PEOPLE v RODRIGUEZ, No. 138780; Court of Appeals No. 290507.

PEOPLE v FIGUEROA, No. 138781; Court of Appeals No. 282020.

PEOPLE v LAROCK, No. 138790; Court of Appeals No. 281381.

FARM BUREAU INSURANCE COMPANY v GRANGE INSURANCE COMPANY, No. 138791; Court of Appeals No. 289054.

KAPUSTIJ v CITY OF HAMTRAMCK, No. 138793; Court of Appeals No. 289720.

KELLY, C.J. (*not participating*). I do not participate in this case because of my relationship to the plaintiff's examining physician.

HATHAWAY, J. I would grant leave to appeal.

PEOPLE v MCCLINTON, No. 138794; Court of Appeals No. 277695.

PEOPLE v CHARLES, No. 138803; Court of Appeals No. 283452.

FITZPATRICK v BETANZOS, No. 138807; Court of Appeals No. 282719.

PEOPLE v RODERICK CROSS, No. 138811; Court of Appeals No. 282033.

PEOPLE v KEVIN HARRIS, No. 138812; Court of Appeals No. 289663.

BAUMGARD v FARMERS INSURANCE EXCHANGE, No. 138814; Court of Appeals No. 281589.

In re WARD REVOCABLE TRUST (WARD-TENBROEKE v MACKENZIE'S ANIMAL SANCTUARY, INC), No. 138817; Court of Appeals No. 289622.

In re BEDNARZ TRUST (SMIGIELSKI v GLANTY), No. 138825; Court of Appeals No. 289372.

PEOPLE v KAUFMAN, No. 138826; Court of Appeals No. 290435.

VERARDI v COWLES, No. 138831; Court of Appeals No. 282010.

PEOPLE v BLACKSHERE, No. 138834; Court of Appeals No. 281463.

PEOPLE v LATIMER, No. 138837; Court of Appeals No. 290209.

PEOPLE v WINDLESS, No. 138841; Court of Appeals No. 281995.

PEOPLE v ORLANDO DAVIS, No. 138844; Court of Appeals No. 290632.

PEOPLE v PHILLIPS, No. 138852; Court of Appeals No. 289768.

FENTON v FARM BUREAU GENERAL INSURANCE COMPANY, No. 138860; Court of Appeals No. 279673.

NEW CENTER PLUMBING & HEATING, INC v HARVARD ENGINEERING & CONSTRUCTION, No. 138861; Court of Appeals No. 283314.

PEOPLE v VERONICA MILLER, No. 138873; Court of Appeals No. 281874.

PEOPLE v BRYANT, No. 138876; Court of Appeals No. 281964.

PEOPLE v HATTEN, No. 138879; Court of Appeals No. 290902.

PARKER v ATTORNEY GENERAL, No. 138896; Court of Appeals No. 287463.

LINDSEY v DAIMLERCHRYSLER CORPORATION, No. 138905; Court of Appeals No. 288834.

PEOPLE v BARNES, No. 138907; Court of Appeals No. 284886.

PHILLIP v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 138922; Court of Appeals No. 282101.

In re TAVORN (DEPARTMENT OF HUMAN SERVICES v TAVORN), Nos. 139300, 139301, and 139302; Court of Appeals Nos. 287495, 287497, and 287498.

Reconsideration Denied August 6, 2009:

PEOPLE v LE, No. 136766. Leave to appeal denied at 482 Mich 1064. Court of Appeals No. 282786.

PEOPLE v GAMBLE, No. 137017. Leave to appeal denied at 483 Mich 976. Court of Appeals No. 276034.

PEOPLE v WILLIAM HALL, No. 137151. Leave to appeal denied at 483 Mich 1016. Court of Appeals No. 284785.

PEOPLE v COLLINS, No. 137387. Leave to appeal denied at 483 Mich 977. Court of Appeals No. 277098.

PEOPLE v BORGES, No. 137677. Leave to appeal denied at 483 Mich 962. Court of Appeals No. 278100.

PEOPLE v MCNAMEE, No. 137719. Leave to appeal denied at 483 Mich 977. Court of Appeals No. 288097.

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 137761. Leave to appeal denied at 483 Mich 962. Court of Appeals No. 277765.

PEOPLE v DUFRESNE, No. 137830. Leave to appeal denied at 483 Mich 978. Court of Appeals No. 273407.

PEOPLE v ANTHONY JONES, No. 137858. Leave to appeal denied at 483 Mich 978. Court of Appeals No. 277854.

PEOPLE v BOYLE, No. 137900. Leave to appeal denied at 483 Mich 979. Court of Appeals No. 288199.

PEOPLE v ADAMS, No. 137959. Leave to appeal denied at 483 Mich 916. Court of Appeals No. 276845.

PEOPLE v MUNLIN, No. 137978. Leave to appeal denied at 483 Mich 979. Court of Appeals No. 272019.

PEOPLE v CORTLAND MILLER, No. 138032. Leave to appeal denied at 483 Mich 979. Court of Appeals No. 281690.

PEOPLE v KING, No. 138073. Leave to appeal denied at 482 Mich 980. Court of Appeals No. 279809.

PEOPLE v WILLIAMS, No. 138089. Leave to appeal denied at 483 Mich 1019. Court of Appeals No. 279713.

PEOPLE v ECKFORD, No. 138145. Leave to appeal denied at 483 Mich 1022. Court of Appeals No. 279501.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Orders Entered July 21, 2009:

PROPOSAL TO ESTABLISH AND REQUIRE COMPLIANCE WITH COURT COLLECTIONS PROGRAM AND REPORTING REQUIREMENTS. On order of the Court, this is to advise that the Court is considering adoption of an administrative order that would require the State Court Administrator to establish court collections program and reporting requirements and that would require courts to comply with those requirements. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Enforcing court orders, including financial sanctions, is a responsibility of the courts that, if done effectively, enhances the courts' integrity and credibility while providing funds to assure victims are made whole and support law enforcement, libraries, the crime victim's rights fund, and local governments. In order to improve the enforcement and collection of court-ordered financial sanctions, it is ordered that the State Court Administrator establish court collections program requirements and that all circuit courts, circuit court family divisions, district courts, and municipal courts comply with those requirements. The State Court Administrative Office shall enforce the requirements and assist courts in adopting practices in compliance with those requirements.[1]

In order to effectively monitor and measure the effect of collections programs, it is ordered that the State Court Administrator establish reporting requirements regarding outstanding receivables and collec-

[1] In order to provide a context for commenting on this proposed administrative order, the current program requirements and components drafted by SCAO and approved by the Court Collections Advisory Committee are attached as an appendix. For more information regarding the Court Collections Advisory Committee's activities over the last five years, please see the materials related to collections on the Court's website at http://courts.michigan.gov/scao/services/collections/collections.htm.

tions efforts undertaken by courts, including establishment of the reporting format, method, and due dates. It is further ordered that all circuit courts, circuit court family divisions, district courts, and municipal courts comply with those requirements. The State Court Administrative Office shall facilitate compliance with and enforce the requirements.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-13. Your comments and the comments of others will be posted at www.courts.mi.gov /supremecourt/resources/administrative/index.htm.

APPENDIX

COURT COLLECTIONS PROGRAM REQUIREMENTS

- Each court must implement or have a collections program in place that conforms to a model developed by the State Court Administrative Office (SCAO) and is designed to improve collections through application of best practices.
- Each court will submit to the SCAO an initial collections program survey with information regarding the program.
- Courts shall report changes in their collections program when requested by the SCAO.
- Courts that do not meet the minimum requirements for an adequate collections program will prepare an action plan to implement program components, with a timetable for intermediate and full implementation, which should not exceed one year. Action plans will be submitted with the collections program survey to the regional administrator for approval by the state court administrator. The court will provide a progress report to the regional administrator one month after implementation.
- The SCAO shall provide for periodic audits of the courts to verify information reported above and confirm that the court is complying with its reported program components. Compliance audit standards include:
  - To be in substantial compliance with program components, the requirement must be met for at least 80 percent of the cases at that stage of collection.
  - To be in partial compliance with program components, the requirement must be met for at least 50 percent of the cases at that stage of collection.
  - To meet the requirements of a collections program model, a court cannot be in less than partial compliance with any component, may be in partial compliance with maximum of one component, and must be in substantial compliance with all other components. If an audit reveals that a court is not in compliance with a collections program, the court must submit a corrective action plan to implement program components, with a timetable for intermediate and full implementation, which should not exceed one year.

Corrective action plans will be submitted to the regional administrator for approval by the state court administrator. A follow-up compliance audit will be performed within a year of implementation.

• The SCAO shall:

○ Make available on its collections website collections program requirements and best practices.

○ Assist courts in implementing a program by providing training, consultation, and technical assistance.

○ Provide courts with current collections data, which must include collections rates and collections programs implemented by the courts. o

○ Ensure that appropriate training programs are in place to educate all stakeholders.

COURT COLLECTIONS PROGRAM MODELS

Ideal

▷ Must consist of all 10 components

Satisfactory

▷ Must consist of components either 1 through 9 or 1 through 8

Adequate

▷Must consist of components 1 through 7

These are the minimum requirements for each model. Court collections programs may have additional components not included in these models.

Regardless of collections rates, a court that has implemented an *ideal, satisfactory,* or *adequate* collections program is in compliance with the *Court Collections Program Requirements*. A court that does not meet the requirements for an *adequate* collections program is not in compliance with the *Court Collections Program Requirements* and must prepare and submit an action plan to become compliant.

COURT COLLECTIONS PROGRAM COMPONENTS — DETAILS

1. Staff or staff time dedicated exclusively to collections activities.

a. This may include court, funding unit, or contractual employees.

b. Collections staff perform the following functions:

i. Respond to all collections-related phone calls and written correspondence.

ii. Ensure that financial assessments are properly entered into the automated system.

iii. Ensure proper removal of discharged debts from the system.

iv. Use all available resources to locate litigants.

v. Review dockets for all judges, magistrates, and referees to determine if an individual who is delinquent will be present for a court proceeding for any reason.

vi. Get jail release dates from the sheriff and make payment arrangements with litigants before release.

vii. Make payment arrangements with litigants as they leave the courtroom.

viii. Review and verify all financial statements to determine a litigant's ability to pay.

ix. Establish and monitor all installment payment plans.

x. Prepare wage assignments.

xi. Issue delinquency notices.

xii. Prepare orders to show cause.

xiii. Prepare bench warrants.

xiv. Prepare state income tax garnishments.

xv. Prepare cases for referral to outside agency for collections.

2. Enforcement of MCR 1.110 and communication of the expectation of payment.

a. All correspondence and contact with the litigant refer to MCR 1.110, which states that payment is due at the time of assessment. In addition, an estimated amount that the litigant will be expected to pay is included in all correspondence. The court:

i. Informs litigants from the bench at the initial hearing or pretrial that payment is due upon assessment and provides an estimated amount due.

ii. Prints the text of MCR 1.110 on all notices to appear.

iii. Advises litigants at the probation screening of the date payment is due and the amount of the expected payment.

b. The court educates the local legal community, as well as the general public, that payment is required at the time of assessment.

3. Payment requirement on the day of assessment.

a. Litigants unable to pay in full on the day of sentencing or disposition are expected to make some payment on the day of assessment. In addition, they are required to complete an application/financial statement for either an extension of time to pay or installment payments.

b. Discussions that relate to requests for additional time to pay, installment payment plans, or wage assignments do not occur in the courtroom. The litigant is led out of the courtroom to discuss payment options with an individual who has been given the responsibility to set up payment plans.

4. Application/financial statement information is verified and evaluated to establish an appropriate payment plan.

a. Litigants are not automatically given time to pay. Before granting additional time to pay or approval for participation in an installment payment plan, the litigant is required to submit proof that he or she needs more time to pay. The litigant is required to complete an application or financial statement that the court analyzes to determine if extra time to pay or an installment payment plan is justified.

b. Payment plans require the highest payment amounts in the shortest period that the litigant can successfully make, considering the amount owed and the litigant's ability to pay.

c. If the court determines that an installment payment plan is warranted, the litigant is required to sign an installment payment

agreement. This document states that the litigant agrees to make payments of the court-ordered assessments, and includes the following information:

i. Total amount owed.

ii. Amount of installment payment.

iii. Payment intervals (weekly/biweekly/monthly).

iv. Specific due dates of each payment.

v. Date the balance should be paid in full.

vi. Statement detailing any sanctions that will be imposed if the litigant fails to comply with the agreement.

vii. Litigant's signature signifying his or her understanding of the agreement.

5. Payment alternatives such as community service are available for those who do not have the ability to pay.

a. Payment alternatives such as community service are not considered unless the litigant is in jeopardy of failing to comply with the court order and has demonstrated that he or she has exercised due diligence in attempting to comply.

b. Payment alternatives may not be used to satisfy certain required assessments (restitution, crime victim's rights assessment, minimum state cost, etc.).

6. Litigants are closely monitored for compliance, and actions such as delinquency notices and wage assignments are taken promptly after noncompliance.

a. The court has established a consistent time standard for initiating enforcement action when a debt becomes past due. This time standard is not so lengthy as to diminish the effectiveness of enforcement.

b. The court promptly notifies the litigant of delinquency.

c. The court requires a wage assignment for all litigants who are employed and who are granted an installment payment plan; or when an installment payment plan is granted to a litigant, he or she is required to complete a wage assignment with the understanding that if a payment is missed, the court will immediately send the wage assignment to the employer.

7. Submit required receivables and collections reports to the SCAO annually.

a. The SCAO has established deadlines and standards applicable to the reports required from all circuit courts, circuit court family divisions, district courts, and municipal courts.

b. The court reviews and utilizes these reports to monitor court collections.

8. Promptly and consistently use statutorily permitted graduated sanctions such as 20 percent late penalty, show cause hearings, bench warrants, and/or state income tax garnishment/intercept.

a. The 20 percent late penalty is assessed as required by statute. In addition, the court informs the litigant of the penalty.

b. If a litigant fails to respond to initial collections efforts, the court sends an order to show cause that requires the litigant to come into court

to explain why he or she has not paid the court-ordered assessments. If the litigant fails to appear as ordered, then a warrant for failure to appear is issued for the person's arrest.

9. Use of locator services.

a. A litigant's personal contact information (home phone number, cell phone number, address, etc.) is verified every time a contact is made with the court.

b. A litigant's financial and employment information is verified every time a collections and/or probation contact is made with the court.

c. The court uses a locator service(s) to help maintain accurate contact information. While the SCAO does not recommend or certify any specific locator service, there are several that have been used by courts. Some will be at a cost, and others will not. These services include:

i. www.accurint.com

ii. www.choicepoint.com

iii. www.switchboard.com

iv. www.yellowpages.com

v. www.daplus.us

vi. www.zabasearch.com

vii. www.whitepages.com

viii. Judicial Data Warehouse www.scao.us

ix. Michigan Department of Corrections Offender Tracking Information System (OTIS) www.michigan.gov/corrections

x. For company information:

1. www.michigan.gov/corporations

2. www.bbb.com

10. Referral to outside agency for collections after all in-house collections efforts are exhausted.

a. The determination to use a third party for collections should be made on a court-by-court basis. A court must determine at what point in the collections process it has little hope of collecting the obligation and when the expense of using a third-party collector is justified. For more complex collections cases, the costs of a third-party collector may not be a factor, because after the court's internal collections efforts have failed and the court has deemed the debt to be uncollectible, any money that a third party collects is money that would not have been collected otherwise.

PROPOSED AMENDMENT OF RULES 7.101 AND 7.105 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendments of Rules 7.101 and 7.105 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov /supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 7.101. PROCEDURE GENERALLY.

(A)-(H) [Unchanged.]

(I) Filing and Service of Briefs.

(1) Within 21 days after the trial court clerk notifies the parties that the record on appeal has been sent to the circuit court, the appellant must file a brief in the circuit court and serve it on the appellee. The appellee may file and serve a reply brief within 21 days after the appellant's brief is served on the appellee. The appellant's brief must comply with MCR 7.212(B) and (C), and the appellee's brief must comply with MCR 7.212(B) and (D).

(2) [Unchanged.]

(J)-(P) [Unchanged.]

RULE 7.105 APPEALS FROM ADMINISTRATIVE AGENCIES IN CONTESTED CASES.

(A)-(J) [Unchanged.]

(K) Briefs and Arguments.

(1) Within 28 days after the record is filed with the court (see MCL 24.304[2]), the petitioner shall file with the court its brief, in the form provided in MCR 7.212(B) and (C), serve a copy on all respondents, and promptly file proof of that service with the court. Within 28 days after petitioner's brief is served, each respondent shall file with the court its brief, in the form provided in MCR 7.212(B) and (D), serve a copy on all other parties, and promptly file proof of that service with the court. The petitioner may file and serve a reply brief within 14 days after service of the respondent's brief. A 28-day extension of the time for filing a brief may be obtained on written stipulation of the parties or by order of the court. Further extension of time for filing of a brief can be obtained only on order of the court on motion for cause shown.

(2)-(4) [Unchanged.]

(L)-(O) [Unchanged.]

Staff Comment: This proposal would clarify that briefs filed in cases that involve an appeal to a circuit court from a district court or an appeal of a decision by a state administrative agency, board, or commission may not exceed 50 pages in length, similar to the length restriction for briefs filed in the Court of Appeals.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-14. Your comments

and the comments of others will be posted at www.courts.mi.gov /supremecourt/resources/administrative/index.htm.

Superintending Control Denied July 29, 2009:

SCHOCK v COURT OF APPEALS, No. 139203. On order of the Court, the motion for immediate consideration is granted. The complaint for superintending control is considered, and relief is denied, because the controversy is moot, this Court having observed that oral argument in the Court of Appeals took place on July 14. We also note that the Court of Appeals granted Dr. Schock permission to have a camera in the attorney waiting room to "pool in" with the courtroom television camera manned by WOOD-TV, Channel 8.

WEAVER, J. (*concurring*). I concur in and join the order granting immediate consideration and declaring the complaint for superintending control moot.[1]

I write further to provide the following as a matter of disclosure. I note that I know Mr. Schock personally, but I have had no past and have no present business relationship with him. I first met Mr. Schock in the fall of 2006 when I was an invited participant in the "You and the Courts" educational video that he and his company produced for Ottawa County. In February 2007, after the then "majority of four" (former Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) adopted their "gag order" on December 6, 2006, and held a public hearing on how to enforce their "gag order" on January 17, 2007, I granted a video interview with Mr. Schock about the Michigan Supreme Court, which he has produced as a DVD.

The "gag order," Administrative Order No. 2006-8, states:

> All correspondence, memoranda and discussions regarding cases or controversies are confidential. This obligation to honor confidentiality does not expire when a case is decided. The only exception to this obligation is that a Justice may disclose any unethical, improper or criminal conduct to the JTC or proper authority.

The "gag order" was used by the "majority of four" to suppress my dissent in *Grievance Administrator v Fieger*, 477 Mich 1228, 1231 (2006), from December 6, 2006, until December 21, 2006. As I stated then, and as

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[1] Before this case became moot, I would have denied the complaint for superintending control because, under the court rules, this Court can only grant superintending control when the Court of Appeals has violated a clear legal duty. MCR 7.301(A)(6). In this case, under Administrative Order No. 1989-1, the Court of Appeals had discretion to grant or not grant Mr. Schock's request to videotape oral arguments. Therefore, this Court could not grant superintending control because there was no clear legal duty for the Court of Appeals to act.

I have stated numerous times, an efficient and impartial judiciary is "ill served by casting a cloak of secrecy around the operations of the courts." *Scott v Flowers*, 910 F2d 201 (CA 5, 1990).

I am neither biased nor prejudiced for or against Mr. Schock and his company. There are no grounds for disqualification, and therefore I participate in this case.

Importantly, after this case became moot, and before this Court issued any order in this case, Mr. Schock sent a further communication to this Court on July 20, 2009. In this later communication, Mr. Schock asked that the Court consider the manner in which the Court of Appeals granted the request of another media organization to film oral arguments while only allowing Mr. Schock to tap in to the other organization's film feed, which obtained less footage of the oral arguments and was of a lower film quality than Mr. Schock would have been able to obtain if he had been allowed to film the argument with his own equipment.

Given the seriousness of the issue as to whether courts (the government) should be deciding which media (the press) are permitted to cover court cases and how media cover court cases, I request that this Court open an administrative file to review the 20-year-old policies pertaining to media filming of court proceedings contained in Administrative Order No. 1989-1.

Accordingly, I concur in the order granting immediate consideration and declaring the complaint for superintending control moot.

MARKMAN, J. (*concurring*). I concur fully in the Court's order, but write separately to respond to Justice WEAVER's nondisqualification statement. In particular, I write to respond to her characterization of herself for the thousandth time as a victim of a "gag order" by this Court. I believe that I can say with confidence, and as the official Michigan Reports will confirm, there has perhaps never been any more *ungagged* member of this Court, especially when it comes to breaching the kind of confidences to which any judicial body is entitled in its deliberations.

To the extent that there has ever been any supposed "gag order," it is reflected in Administrative Order No. 2006-8, which states in pertinent part, "All correspondence, memoranda and discussions regarding cases or controversies are confidential." This order remains intact, even with the changing majority on this Court, and reflects the historic practices both of the Michigan Supreme Court and of every other state and federal court in this country from time immemorial. Justice WEAVER's repeatedly expressed unwillingness to abide by AO 2006-8, and this Court's consequent discussions concerning how best to maintain the integrity of its deliberations in light of Justice WEAVER's conduct, do not make her the "victim" of a "gag order," or of anything else. Rather, they make her a justice who has seriously obstructed the people's work on this Court by rendering its deliberations subject to disclosure at her exclusive whim and in accord with her own unique recollections. No responsible judicial body can operate under such strictures, and the conferences of this Court

have suffered considerably as a result. Justice WEAVER's posture, shared by no other past or present justice, is one in which no other justice's views matter than her own.[1]

In response to similar assertions by Justice WEAVER that she was the victim of a "gag order," former Chief Justice Clifford TAYLOR remarked several years ago that "despite the fact that a justice of this Court has now engaged, and continues to engage, in the unprecedented act of revealing deliberative confidences, every word of every statement of hers has been made public exactly as she has written it." *Grievance Administrator v Fieger*, 477 Mich 1228, 1229 (2006). This observation remains just as true today.[2]

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

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[1] Although Justice WEAVER invariably places blame, as she does once again in this case, upon the "majority of four" for supposedly "gagging" her, previously she has placed blame upon *each* of her six colleagues for allegedly victimizing her in this way. See *In re Gilbert*, 469 Mich 1224, 1230 (2003), in which Justice WEAVER accused a "six-justice majority" of "suppressing" two of her statements, and engaging in a "cover-up," where, in an effort to persuade her to reconsider her conduct, her colleagues sought to *delay* Justice WEAVER's statements, issuing a public denunciation of a judge whose Judicial Tenure Commission complaint was still pending before this Court and thereby undermining the fairness of his appellate process. As with every other statement that Justice WEAVER has ever issued, these statements too were eventually published.

[2] Concerning Justice WEAVER's decision in this case not to disqualify herself, I do not participate in this decision, but I note that: (a) despite having repeatedly criticized her colleagues for their ethical shortcomings in failing to recognize that a judge "may be the last person" to perceive bias in his or her own case, *Grievance Administrator v Fieger*, 476 Mich 231, 340 (2006), Justice WEAVER, unlike Justice HATHAWAY, see *United States Fidelity & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 45 (2009), has not sought a vote from her colleagues approving or disapproving her own decision; and (b) despite having also repeatedly criticized her colleagues for their ethical shortcomings in abiding by the traditional "actual bias" test for disqualification, and having now proposed an alternative "appearance of impropriety" test, Justice WEAVER is content in her own case to state merely, "I am neither biased nor prejudiced for or against Mr. Schock and his company." This is clearly an inadequate explanation for her decision under either her own test or under the newly established 'objective' test of the United States Supreme Court in *Caperton v A T Massey Coal Co, Inc*, 556 US ___; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

Order Entered July 31, 2009:

PROPOSED AMENDMENT OF RULE 6.201 OF THE MICHIGAN COURT RULES. On order of the Court, this is to advise that the Court is considering amendment of Rule 6.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.201. DISCOVERY.

(A) [Unchanged.]

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case~~.~~

(6) any electronic recording evidence made by any governmental agency or agent pertaining to the case known to the prosecuting attorney. Such records shall be preserved by the prosecuting attorney until after all appeals have been exhausted or all rights of appeal have expired, whichever date is later. Failure to preserve such evidence will entitle the accused to a jury instruction that such evidence not produced may be presumed by jurors to have been adverse to the prosecution.

(C)-(J) [Unchanged.]

CORRIGAN, J. (*dissenting*). I would not publish the proposed amendment of MCR 6.201 because I do not think that this Court has the authority to govern the record keeping procedures of prosecutors and government agencies. Further, this proposal presents significant practical problems without any showing of the need for such a change.

Proposed subrule B(6) would penalize a prosecutor, without regard to his good faith, for failing to preserve "any electronic recording evidence made by any governmental agency or agent pertaining to the case known to the prosecuting attorney." It would further require retention of such evidence for an essentially indefinite period: "until after all appeals have

been exhausted or all rights of appeal have expired." The rule thus would impose a duty on prosecutors to preserve evidence without regard to whether it is exculpatory or even admissible at trial for an indefinite period if the evidence may ultimately be said merely to "pertain[]" to any case. Accordingly, the rule effectively would require prosecutors to devise a method to obtain, permanently store, catalogue, and reproduce every audio or visual recording made by government agencies that could ever pertain to any case.[1] Further, because the rule addresses "evidence made by any governmental agency or agent," it would implicate the initial retention of all records of all agencies—including the field tapes of police and emergency personnel, tapes of 911 calls, digital booking photos, etc.—and would impliedly affect the normal processes of government agencies in erasing and reusing apparently outdated recording media. Such a court rule implicating the record retention practices of prosecutors and state agencies appears to violate the separation of powers required by our state constitution. Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").[2] Accordingly, I cannot conclude that this Court has the power to direct and sanction the record keeping practices of these agencies or the prosecutor in this way. To the contrary, the concerns underlying the proposed amendment—which appear to be directed broadly at the record retention practices and policies of government agencies—are more appropriately addressed by the Legislature, the Attorney General, or the agencies at issue.

Significantly, prosecutors' duties with regard to *court* proceedings—which *are* properly governed by this Court—are already addressed by the existing rule. MCR 6.201(B) *already* requires prosecutors to provide defendants with "any exculpatory information or evidence known to the prosecuting attorney," police reports, interrogation records, and statements pertaining to the case, and records concerning any searches or seizures connected to the case, among other things. MCR 6.201(J), in turn, provides remedies for a violation of the provisions of MCR 6.201(B), including sanctions for willful violations.

YOUNG and MARKMAN, JJ., concur with CORRIGAN, J.

Staff Comment: This proposal was submitted to the Michigan Supreme Court by the State Bar of Michigan Representative Assembly. It would require prosecutors to maintain electronic recording evidence made by governmental agencies until the time for all appeals has expired.

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[1] Because prosecutors would be subject to a penalizing jury instruction for failure to produce such evidence, prosecutors would be required to obtain and maintain equipment to reproduce the electronic recordings.

[2] Local prosecutors operate under the supervision of the state Attorney General, MCL 14.30, who in turn is an elected official within the Executive Branch. Const 1963, art 5, § 21.

Failure to preserve evidence would entitle the defendant to a jury instruction that jurors may presume any evidence not produced was adverse to the prosecution.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-38. Your comments and the comments of others will be posted at www.courts.mi.gov /supremecourt/resources/administrative/index.htm.

Order Entered August 5, 2009:

PROPOSED AMENDMENTS OF RULES 6.425 AND 6.610. On order of the Court, this is to advise that the Court is considering amendments of Rules 6.425 and 6.610 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A) [Unchanged.]

(B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the presentence report is not made available to the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the defendant's lawyer, or the defendant if not represented by a lawyer, to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have

been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) ~~At the~~ For sentencing, the court shall:

(a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;

(b) give the defendant's attorney or, if the defendant is not represented by an attorney, the defendant an opportunity to review the presentence report, if any, and to advise the court of circumstances the defendant believes should be considered in imposing sentence; ~~and~~

(c) inform the defendant of credit to be given for time served, if any.~~:~~; and

(d) if a presentence report was prepared, the court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the presentence report is not made available to the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the defendant's lawyer, or the defendant if not represented by a lawyer, to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et seq.*, unless an address is used to identify the place of the crime.

(G)-(H) [Unchanged.]

CORRIGAN, J. (*dissenting*). I would not publish the proposed amendment of MCR 6.425 and 6.610 because I am concerned that the language recommended by the State Bar promotes asymmetry in the motions made available to defendants and prosecutors regarding untimely presentence reports and because the recommended language may run afoul of an

existing statute mandating that presentence reports be privileged communications. Although I do not oppose increasing the amount of time in which courts must provide copies of presentence reports, I would have addressed these drafting deficiencies before submitting the proposed amendment for public comment.

Proposed MCR 6.425(B) and MCR 6.610(F)(1)(d) both state that if a presentence report is not made available at least two business days before sentencing, "the defendant's lawyer (or the defendant if not represented by a lawyer) shall be entitled, on oral motion, to an adjournment." The purpose of allowing defendants or their attorneys to request an adjournment is so that defendants can "review the presentence report and [] prepare any necessary corrections, additions or deletions to present to the court." The recommended language in both rules, however, entirely excludes prosecutors from moving for an adjournment if a presentence report has not been made available to them at least two business days before the date of sentencing. I question what rationale, if any, undergirds this disparity between the motions made available to prosecutors and the motions made available to defendants concerning untimely presentence reports. Both prosecutors and defendants should be able to request an adjournment because both parties should carefully review an individual's presentence report and apprise the court of any inaccuracies or necessary changes. Consequently, I would correct this asymmetry in the recommended language of proposed MCR 6.425(B) and MCR 6.610(F)(1)(d).

Moreover, I am concerned that insofar as the proposed amendment of MCR 6.425(B) and MCR 6.610(F)(1)(d) provides that the prosecutor, the defendant's attorney, or the defendant "may retain their copies [of the presentencing report] for their records," it may run afoul of MCL 791.229.[1] According to MCL 791.229, a presentence report "shall be privileged or confidential communications not open to public inspection." MCL 791.229. Additionally, the Legislature specified that only "[j]udges and probation officers shall have access to the records, reports, and case

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[1] MCL 791.229 provides that

> [a]ll records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to the records, reports, and case histories. The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the records, reports, and case histories and shall permit designated representatives of a private vendor that operates a youth correctional facility under [MCL 791.220g] to have access to the records, reports, and case histories pertaining to prisoners assigned to the youth correctional facility. The relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate.

histories." *Id*. As privileged communications, presentence reports are subject to disclosure to necessary parties set forth in MCR 6.425(B) and (C). MCR 6.425(B) provides that the court may exempt "information or a diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality." The same material is exempt if copies of the report are later provided to the parties named in MCR 6.425(C). Importantly, however, neither MCR 6.425(B) nor MCR 6.425(C) states that the prosecutor or the defendant shall retain their copies of the presentence report for their records.[2] The statutory confidentiality afforded a presentence report under MCL 791.229 explains why such reports traditionally are not made part of the circuit court file. Moreover, it explains why in cases where the report must be transmitted to the Court of Appeals, the presentence report is not made a part of the public record there either.[3] Accordingly, I would delete the portion of the proposed amendment that allows the prosecutor and the defendant to retain their copies of the defendant's presentence report.

Because I believe that this Court should have addressed these drafting deficiencies before submitting the proposed amendment of MCR 6.425 and 6.610 for public comment, I respectfully dissent from the publication of the proposed amendment.

YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

Staff Comment: The proposed amendments of Rules 6.425 and 6.610 of the Michigan Court Rules were submitted by the Representative Assembly of the State Bar of Michigan and would increase the time within which a court is required to provide copies of the presentence report to the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, to two business days before the day of sentencing. If the report is not made available at least two days before sentencing, the defendant's lawyer, or the defendant, if not represented by a lawyer, would be entitled to adjournment to prepare necessary corrections, additions, or deletions to present to the court. The proposed revisions of these rules also would prohibit the inclusion of specific information in the report about the victim or witness.

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[2] I acknowledge that MCR 6.425(C) provides in relevant part, "[a]fter sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it." Notably, MCR 6.425(C) does not include any language mandating that the parties who request a copy of a presentence report after sentencing shall retain that copy for their personal records.

[3] A presentence report must be sent to the Court of Appeals only if a sentencing issue is being raised on appeal. MCR 7.212(C)(7). Similarly, MCL 769.34(8)(b) states that the presentence report shall be part of the record filed for an appeal of a sentence, except that any exempted portion shall not be made a part of the public record.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by December 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-39. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Superintending Control Denied August 6, 2009:

EASLEY v ATTORNEY GRIEVANCE COMMISSION, No. 138733; AGC: 2326/07.

CANTY v ATTORNEY GRIEVANCE COMMISSION, No. 138758; AGC: 0201/08.

Index-Digest

INDEX–DIGEST

ACTIONS

CLASS ACTIONS

1. The standard of review for class certification encompasses de novo review on questions of law, review for clear error on questions of fact, and review for abuse of discretion on the ultimate decision on the motion for class certification. *Henry v Dow Chemical Co*, 484 Mich 483.
2. A party seeking class certification cannot sustain its burden of proving that all the prerequisites of the Michigan Court Rules are met by means of a bare assertion that the prerequisites have been met unless the facts necessary to support such a finding are uncontested or admitted by the opposing party (MCR 3.501[A]). *Henry v Dow Chemical Co*, 484 Mich 483.
3. If the pleadings alone are not sufficient to establish that the prerequisites for class certification have been met, a trial court must look beyond the pleadings to determine whether class certification is proper by analyzing any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case (MCR 3.501[A]). *Henry v Dow Chemical Co*, 484 Mich 483.

MEDICAL MALPRACTICE

4. A timely but defective notice of intent to commence a medical malpractice action tolls the statute of limitations (MCL 600.5856[c]). *Bush v Shabahang*, 484 Mich 156.
5. A court is not required to dismiss with prejudice a claim for medical malpractice if the notice of intent to commence the action was defective. *Bush v Shabahang*, 484 Mich 156.
6. The statutory provision that gives courts the power to

cure defects within processes, pleadings, or proceedings for the furtherance of justice may be employed to cure defects in a notice of intent if a party has made a good-faith attempt to comply with the content requirements of the statutory notice provision (MCL 600.2301). *Bush v Shabahang*, 484 Mich 156.

7. A professional corporation rendering professional health care services and the health care provider are treated as the same entity for the purpose of providing a notice of intent to bring a claim for medical malpractice (MCL 450.221 *et seq*., 600.2912b). *Potter v McLeary*, 484 Mich 397.
8. A claim against a professional corporation sounds in medical malpractice rather than ordinary negligence if the claim occurs when the professional corporation is rendering services through a licensed or authorized officer, employee, or agent as set forth in MCL 450.225, and if the claim poses questions of medical judgment outside the realm of common knowledge and experience. *Potter v McLeary*, 484 Mich 397.
9. Only those health care providers and facilities designated in the statutory provision that addresses the accrual of medical malpractice claims may be sued for medical malpractice (MCL 600.5838a). *Potter v McLeary*, 484 Mich 397.
10. A notice of intent to bring a medical malpractice claim that alleges only vicarious liability need not specifically set forth the legal theory of vicarious liability or include a statement of the defendant's employment relationship with the health professional whose actions gave rise to the suit (MCL 600.2912b). *Potter v McLeary*, 484 Mich 397.

AT-WILL EMPLOYMENT—*See*

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ESTABLISHED CUSTODIAL ENVIRONMENT PRESUMPTION—*See*

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HEALTH

LOCAL HEALTH DEPARTMENTS

1. A local health department created pursuant to part 24 of the Public Health Code has the authority under that part and part 126, also known as the Michigan Clean

Indoor Air Act, to promulgate, implement, and enforce regulations in indoor public places that are at least as stringent as those established by state law (MCL 333.2433[1], 333.2435[d], 333.2441[1], and 333.12613[2]). *McNeil v Charlevoix Co*, 484 Mich 69.

2. A regulation by a local health department created pursuant to part 24 of the Public Health Code that prohibits smoking in all enclosed public places and requires employers that do not wholly prohibit smoking at an enclosed work site to designate a department-approved smoking room for those of its employees who smoke does not conflict with part 126 of the Public Health Code, also known as the Michigan Clean Indoor Air Act (MCL 333.2401 *et seq*. and 333.12601 *et seq*.). *McNeil v Charlevoix Co*, 484 Mich 69.
3. A regulation by a local health department created pursuant to part 24 of the Public Health Code that prohibits an employer from discharging, refusing to hire, or otherwise retaliating against an employee for exercising his or her right to a smoke-free working environment mandated by the regulation does not violate the public policy of recognizing the right to terminate employment at will (MCL 333.2401 *et seq*.). *McNeil v Charlevoix Co*, 484 Mich 69.

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INDEMNIFICATION—*See*

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INSURANCE

NO-FAULT

1. The Michigan Catastrophic Claims Association may not refuse to indemnify unreasonable charges for personal protection insurance benefits because the statutory provision setting forth its indemnification obligation does not contain a standard of reasonableness (MCL 500.3104[2]). *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1.

2. The statutory powers of the MCCA to adjust the practices and procedures of member insurers do not encompass adjusting the payment amount to which a claimant and a member insurer have agreed (MCL 500.3104[7]). *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1.
3. The limited statutory power of the MCCA to further its purpose of prompt and efficient indemnification of its members does not extend to declining to indemnify unreasonable charges (MCL 500.3104[8][g]). *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1.

JAIL CREDIT STATUTE—*See*

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1. *Jackson v Green Estate*, 484 Mich 209.

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1. *In re Servaas*, 484 Mich 634.

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See, also, ACTIONS 4

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1. *Jackson v Green Estate*, 484 Mich 209.

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NOTICE OF INTENT TO FILE A CLAIM—*See*

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OFFENSE VARIABLES—*See*

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PARENT AND CHILD

CHILD CUSTODY

1. The parental presumption contained in MCL 722.25(1) prevails over the presumption in favor of an established custodial environment contained in MCL 722.27(1)(c) in an action in which both presumptions apply. *Hunter v Hunter*, 484 Mich 247.
2. The presumption in MCL 722.25(1) that in a custody dispute between a parent and an agency or third person the court shall presume that the best interests of the child are served by awarding custody to the parent applies to all natural parents who are parties, not merely fit natural parents; the presumption applies unless the contrary is established by clear and convincing evidence. *Hunter v Hunter*, 484 Mich 247.

PARENTAL PRESUMPTION—*See*

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JAIL CREDIT STATUTE

1. A parolee who is convicted of and sentenced to a term of imprisonment for an offense committed while on parole resumes serving his or her original maximum sentence on the date the parolee is arrested for the new offense; the parolee is not entitled to credit against his or her new minimum sentence for the time served in jail between arrest and sentencing on the new offense (MCL 769.11b, 791.238[2]). *People v Idziak*, 484 Mich 549.

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SCORING OFFENSE VARIABLES—*See*

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SENTENCES

CONTROLLED SUBSTANCES

1. MCL 333.7413(2) authorizes a sentencing court to double both the minimum sentence calculated under the sentencing guidelines and the statutory maximum sentence of a defendant who is a repeat controlled substances offender. *People v Lowe*, 484 Mich 718.

SENTENCING GUIDELINES

2. Offense variables under the sentencing guidelines must be scored by reference only to the offense for which the defendant is being sentenced unless an offense variable statute specifically provides otherwise and allows consideration of conduct beyond the sentencing offense (MCL 777.1 *et seq*.). *People v McGraw*, 484 Mich 120.

SENTENCING GUIDELINES—*See*

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WORKERS' COMPENSATION 1

WORKERS' COMPENSATION

WORKERS' DISABILITY COMPENSATION ACT

1. The term "prorate," as used in the statutory provision that gives workers' compensation magistrates the authority to prorate attorney fees, applies exclusively to employers and their insurance carriers (MCL 418.315[1]). *Petersen v Magna Corp*, 484 Mich 300.